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No.

IN THE

Supreme Court of the United States

October Term 1991

CHILDREN'S LEGAL FOUNDATION, INC. AND
AMERICAN FAMILY ASSOCIATION, INC.,

PETITIONERS,

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA

ACTION FOR CHILDREN'S TELEVISION, et al.,

RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Is indecent broadcasting a form of unprotected speech, to wit, speech that constitutes a nuisance?

2. If the plurality opinion in Federal Communications Commission v Pacifica Foundation, 438 U.S. 726 (1978), continues to be the holding of the Court, did the Court of Appeals for the District of Columbia Circuit err in holding that the Federal Communications Commission must adopt a "safe harbor" approach to indecent broadcasting?

3. Is the prohibition in Title 18 United States Code, section 1464 regarding indecent language an "indecent for all" standard?

4. Does the decision of the court below, requiring the Federal Communications Commission to demonstrate that the restriction on indecent broadcasting is the least restrictive means of furthering a compelling governmental interest, comport with Federal Communications Commission v Pacifica Foundation, 438 U.S. 726 (1978), and Federal Communications Commission v League of Women Voters, 468 U.S. 364 (1984), both of which applied a different standard of review to the broadcast regulation at issue?

LIST OF PARTIES

The following persons and entities were parties to the proceedings in the Court of Appeals for the District of Columbia Circuit; the petitioners in this Court are italicized:

Petitioners: Capital Cities/ABC, Inc.; Action for Children's Television; American Civil Liberties Union; Association for Independent Television Stations, Inc.; Infinity Broadcasting Corporation; Motion Picture Association of America, Inc.; National Association of Broadcasters; National Broadcasting Company; National Public Radio; People for the American Way; Post-Newsweek Stations, Inc.; Public Broadcasting Service; Radio-Television News Directors Association; The Reporters Committee for Freedom of the Press; Society of Professional Journalists; The Pacifica Foundation.

Respondents: Federal Communications Commission and United States Department of Justice.

Intervenors: *Children's Legal Foundation, Inc. and American Family Association, Inc.* on behalf of Respondents. PEN American Center, Allen Ginsberg, et al. on behalf of Petitioners.

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ACTION FOR CHILDREN'S TELEVISION, *et al.*,
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioners respectfully petition this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in Action for Children's Television v Federal Communications Commission, No. 88-1916, on May 17, 1991. The judgment enjoined the Federal Communications Commission from enforcing the prohibition against the broadcast of indecent material as proscribed by Title 18 United States Code, section 1464.

OPINION BELOW

The Court of Appeals for the District of Columbia Circuit is reported at 932 F.2d 1504. The opinion of the court is

reprinted in the Appendix at page A2.

The Report of the Federal Communications Commission is reprinted in the Appendix at page A17.

JURISDICTION

The judgment to be reviewed was entered on May 17, 1991. The petition to rehear was denied on August 28, 1991.

This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion; or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The statute under review in this case, 18 U.S.C. §1464 provides:

> Whoever utters any obscene, indecent, or profane language by means of radio communications shall be fined not more than $10,000 or imprisoned not more than two years, or both.

In 1988, as a part of the FCC's appropriation bill for fiscal year 1989, the law was amended to include the

following language:

> By January 31, 1989, the Federal Communications Commission shall promulgate regulations in accordance with section 1464, title 18, United States Code, to enforce the provisions of such section on a 24 hour per day basis.

Pub. L. No. 100-459, §608, 102 Stat. 2228 (1988).

The Commission's conclusions in its Report on the Notice of Inquiry stated:

> 91. Based upon the information contained in the record and discussed in this Report, and our analysis of the applicable constitutional law as recently set forth by the Supreme Court in Sable, we conclude that the 24-hour prohibition on broadcast indecency is the most narrowly tailored means of protecting children from indecent material. In 1988 Congress, concerned with children's access to indecent material through broadcast stations, statutorily required this Commission to enforce the prohibition against indecent material on a 24-hour-a-day basis. In response to the Court's remand of the record in ACT II, in which the validity of the statute and the Commission's implementation of it was put at issue, we have conducted a full and fair proceeding to assess the validity of the 24-hour prohibition. In the NOI, we invited comment on a broad range of relevant issues and received comment on these and additional issues that responding parties

wished to address. Over 92,500 comments have been received in response to this NOI, the vast majority of which favor the 24-hour prohibition.

92. Congress and the courts have determined that indecent material is potentially harmful to children. The Commission's definition of indecency has been affirmed by the Supreme Court, and permits broadcasters to identify material that is indecent. Because data gathered in this proceeding establish that children are in the broadcast audience at all times of the day and night, we do not believe that a channeling mechanism will accomplish the compelling governmental purpose of protecting children. Adults, on the other hand, have other means to access such material should the so desire.

93. To comply with Sable's requirement that the means to accomplish the governmental interest be tailored as narrowly as possible, we have decided, when enforcing the 24-hour prohibition, to consider on a case-by-case basis any information that children are not in the broadcast audience in the market of the station accused of airing indecent material. This policy, we believe, will ensure that enforcement actions are taken only against those stations that broadcast indecent material when children are in the audience.

In the Matter of Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. §1464, MM Docket No.

89-494, 5 FCC Rcd 5297 (Aug. 6, 1990) at 41.

STATEMENT OF THE CASE

Facts

On October 1, 1988, the President signed into law a 1989 appropriations bill that required the provisions of Title 18, United States Code, section 1464 be enforced 24 hours each day. The Commission promulgated rules prohibiting the broadcast of all indecent material. This action was commenced in the Court of Appeals for the District of Columbia Circuit in 1989. The Court of Appeals took jurisdiction over the matter pursuant to 28 U.S.C. §2342(1).

On September 3, 1989, the Court of Appeals remanded the cause to the Federal Communications Commission "to conduct a full and fair hearing on the propriety of indecent broadcasting" in light of this Court's decision in Sable Communications of California, Inc. v Federal Communications Commission, 492 U.S. 115 (1989).

On October 26, 1989, the Commission adopted a Notice of Inquiry to initiate the proceeding under remand from the Court of Appeals. The Notice of Inquiry was released on November 20, 1989. Comments were filed on February 20, 1990, and reply comments were filed on April 19, 1990. The Federal Communications Commission received approximately 92,500 informal and formal comments to the Notice of Inquiry.

On August 6, 1990, after careful consideration of all of the Comments, the Fcc issued its Report which found that prohibiting broadcast indecency 24-hours a day comported with the constitional standards ennumciated in Sable.

Following the FCC's Report and after briefing by all parties the Court of Appeals heard oral argument in the matter on January 28, 1991 and issued its decision on May 17, 1991.

REASONS FOR GRANTING THE WRIT

I. IS INDECENT BROADCASTING A FORM OF UNPROTECTED SPEECH, TO WIT, SPEECH THAT CONSTITUTES A NUISANCE?

A. THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT, TO – WIT: THAT INDECENT BROADCAST IS PROTECTED BY THE CONSTITUTION AND THAT A TIME 0F DAY MUST BE FOUND WHEN THE BROADCAST PIG CAN ENTER UNINVITEDLY INTO THE PRIVACY OF EVERY HOME.

In Action for Children's Television v. Federal Communications Commission, 852 F.2d 1332 (D.C. Cir. 1988) ("ACT I"), a panel of the Federal Circuit, "adhering to the view that broadcast material that is indecent but not obscene may be channeled to certain times of day but not proscribed entirely," invalidated the FCC's "hours restraint" and remanded for reconsideration of "the times at which programs containing indecent material may be broadcast." Id., at 1335, In Action For Children's Television v. Federal Communications Commission, 932 F.2d 1504 (D.C. Cir. 1991) (ACT II"), a second panel of the Federal Circuit, believing that the disposition of the case was "governed by" ACT I, invalidated the FCC order prohibiting indecent broadcast on 24 hour per day basis. Nowhere does the opinion in ACT I or ACT II even mention, let alone discuss, the "nuisance rationale" that carried the day in Pacifica.

F.C.C. v. Pacifica Foundation, 438 U.S. 726 (1978)

("Pacifica") is the only Supreme Court case on the subject of broadcast indecency, and in Pacifica, this Court did not say that material indecent "as broadcast" is protected by the Constitution and that a time of day must be found when patently offensive, indecent language can be broadcast uninvitedly into the privacy of every home. In Pacifica, this Court recognized that indecent language, which very well may be protected in other contexts or media, can nevertheless be prohibited "as broadcast." Id., at 746 [W]e may assume, arguendo, that this monologue would be protected in other contexts; " id ., at 759-60 (Powell, J., concurring): "Although the First Amendment may require unwilling adults to absorb the first blow of offensive. . .speech when. . . in public..., a different order of values obtains in the home. , . .This is not to say. . .the [FCC] has an unrestricted license to decide what speech, protected in other media, may be banned from the airwaves...but...its judgment is entitled to respect" [emphasis supplied].

Mr., Justice Stevens, who delivered the opinion of this Court in Pacifica with respect to Parts I, II, III and IV-C, compared indecent broadcast to a "pig in the parlor instead of the barnyard" and noted that a "nuisance may be merely a right thing in a wrong place" [emphasis supplied]. Id., at 750. Mr. Stevens also addressed the concept of "nuisance speech" in Parts IV-A and IV-B of his Pacifica opinion. Mr. Justice Powell did not join in these Parts only because he objected to the characterization of indecent language as "less 'valuable."' Id. at 761 (Powell, J., concurring) [But see, Barnes v. Glen Theatre, Inc., 501 U.S. ____, 115 L.Ed. 2d 504 (1991); Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1988), New York v. Ferber, 458 U.S. 747, 762-64 (1982); California v. LaRue, 409 U.S. 109, 118 (1972)]. In Pacifica however, the plurality opinion constitutes the holding of the Court and provides the governing standards because its rationale set forth the narrowest ground for the result. See Marks v.

United States, 430 U.S. 188, 193-194 (1977); Lakewood v Plain Dealer, 486 U.S. 750, 764 n.9 (1988).

In concluding that a broadcast of "patently offensive words dealing with sex and excretion" could be regulated "because of its content," Mr. Justice Stevens stated in Pacifica at 438 U.S. 746:

> "If there were any reason to believe that the Commission's characterization of the Carlin monologue as offensive could be traced to its political content..First Amendment protection would be required. But that is simply not the case. These words offend for the same reason obscenity offends. Their place in the hierarchy of First Amendment values was aptly sketched by Mr. Justice Murphy when he said: '[S] uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' Chaplinsky v. New Hampshire, 315 U.S., at 572."

Mr. Justice Murphy's statement in Chaplinsky was a "paraphrase" of a statement found in Zechariah Chafee, Jr.'s Free Speech in the United States, Harvard University Press (1942), which was cited by this Court in Chaplinsky at 315 U.S. 572, notes 4 & 5. Chafee in his book states at pages 149-150:

> "[B]ut the law also punishes a few classes of words like obscenity, profanity, and gross libels upon individuals, because the very utterance of such words is considered to inflict a present injury upon listeners...or else to

> render highly probable an immediate breach of the peace. This is a very different matter from punishing words because they express ideas.... I believe that if properly limited, [these verbal peace-time crimes] fall outside the protection of the free speech classes.... The true explanation is that profanity and indecent talk and pictures, which do not form an essential part of any exposition of ideas, have a very slight social value as a step toward truth, which is clearly outweighed by the social interests in order, morality, the training of the young, and the peace of mind of those who hear and see. ...The man who swears in a street car is as much of a nuisance as the man who smokes there" [emphasis supplied].

In Rosenfeld v. New Jersey, 408 U.S. 901, at 905-06 (1972), Mr. Justice Powell, with whom the Chief Justice and Mr. Justice Blackmun joined, wrote in dissent:

> "But the exception to the First Amendment protection in Chaplinsky is not limited to words whose mere utterance entails a high probability of an outbreak of violence. ...[A] verbal assault on an unwilling audience may be so grossly offensive...as to be the proper subject of criminal proscription...under a statute denominating it...a public nuisance. . . [N]either category falls within the protection of the First Amendment" [emphasis supplied].

In Hess v. Indiana, 414 U.S. 105, at 107-108 (1973), this Court, after noting that the First Amendment forbids government from punishing the use of language not within

"narrowly limited classes of speech," found that the language at issue in that case was not "obscene" and did not amount to "fighting words" or to a "public nuisance in that privacy interests were being invaded" [emphasis supplied].

In Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 271, n. 4 (1988), this Court noted that its decision in Bethel School District 403 v. Fraser, 478 U.S. 675 (1986), upholding a school district's authority to prohibit an indecent speech in a school assembly comprised of both adults and students, did not rest upon any finding that the speech had a propensity to "materially disrupt" classwork, but rather on its "vulgar," "lewd" and "plainly offensive" character.

In Federal Communications Commission v. League of Women Voters of California, 468 U.S 364 (1984), this Court distinguished its decision in Pacifica, noting at page 380, n.13:

> In this case...we are not faced with indecent expression, but rather with expression that is at the core of First ,Amendment protections, and no claim is made...that the expression of editorial opinion by noncommercial [broadcast] stations will create the substantial 'nuisance' of the kind addressed in FCC v. Pacifica...." [emphasis supplied],

Based on these cases, it the opinion of Petitioners that indecency in broadcasting is unprotected by the First Amendment and should be treated as such. In Pacifica, this Court recognized that what amounts to a "nuisance" requires consideration of a "host of variables," noting that the Commission had emphasized "[t]he time of day." Id., at 750. Neither the Pacifica Court nor the Commission, however, decided that it would be permissible to broadcast the

particular Carlin monologue at a late hour. Id., at 750, n. 28.

The critical importance of this case was spelled out in a related context by Mr. Chief Justice Burger, with whom Mr. Justice Blackmon and Mr. Justice Rehnquist joined, dissenting in Rosenfeld v. New Jersey, 408 U.S. 901, 902 (1972):

> "The important underlying aspect...goes really to the function of law in preserving ordered liberty. ...History is replete with evidence of what happens when the law cannot or does not provide a collective response for conduct so widely regarded as impermissible and intolerable. ...If continued, this permissiveness will tend further to erode public confidence in the law – that subtle but indispensable ingredient of ordered liberty."

II. IF THE PLURALITY OPINION IN FEDERAL COMMUNICATIONS COMMISSION V PACIFICA FOUNDATION, 438 U.S. 726 (1978), CONTINUES TO BE THE HOLDING OF THE COURT, DID THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT ERR IN HOLDING THAT THE FEDERAL COMMUNICATIONS COMMISSION MUST ADOPT A "SAFE HARBOR" APPROACH TO INDECENT BROADCASTING?

Pacifica has frequently been distinguished, but it has never been overruled and is therefore the precedent with respect to the regulation of indecent broadcasts.

A. THE NUISANCE RATIONALE DEVELOPED IN

PACIFICA DOES NOT REQUIRE A "SAFE HARBOR" TIME FOR INDECENT BROADCASTS

In Pacifica, this Court held that the Carlin monologue "as broadcast" was indecent and prohibited by 18 U.S.C. §1464. Using the nuisance rationale, Pacifica Court found that indecent speech was akin to a pig in the parlor. This meant only that the same speech may be afforded full First Amendment protections if uttered in other media. In addition, the nuisance rationale would permit certain material to be broadcast at one time of the day without being found to be indecent while that same speech would be indecent under the concept if broadcast at another time of the day.

This Court in Pacifica suggested that an offensive broadcast "might not be indecent" if it had serious value and was broadcast "in the late evening." 438 U.S. at 732, n.5. This Court also stated that it was not deciding whether "broadcasting audiences in the late evening contain so few children that playing [the Carlin] monologue would be permissible." Id. at 750, n.28. This Court did not, however, say that the Commission was required to permit the broadcast of indecent material during the late hours of the evening or any other time of the day.

Time of day is a variable which the Commission should consider during its administrative review of a potentially indecent broadcast in determining whether that broadcast was in fact indecent under §1464. It is not, however, a constitutionally mandated limitation on the authority of the Commission in setting forth regulations regarding the broadcast of indecent material.

B. THIS COURT'S DECISION IN SABLE COMMUNICATIONS OF CALIFORNIA, INC. V FEDERAL COMMUNICATIONS COMMISSION DID NOT OVERRULE PACIFICA AND IS

CONSISTENT WITH THIS COURT'S DECISION IN PACIFICA.

In Sable Communications of California Inc. v Federal Communications Commission, 492 U.S. 115 (1989), the Supreme Court noted that the "private commercial telephone communications" at issue were "substantially different" from the "public radio broadcasting" at issue in Pacifica. 492 U.S. at 127. The Court in Sable also said that, "Sexual expression which is indecent but non-obscene is protected by the First Amendment . . . ." Id. at 126. The government in Sable, however, did not contend that indecent commercial telephone messages are unprotected, and the Court's statement as it is applied to broadcast indecency is purely dicta. Further, the Court in Sable did not say that a prohibition on indecent communications per se violates the First Amendment, and the issue here is whether a prohibition on matter indecent "as broadcast" violates the First Amendment.

In distinguishing the context of dial-it services from that of the broadcast medium, however, the Sable Court was careful to note that the government's regulation of broadcast indecency furthered two valid governmental interests: 1) protecting adult listeners and viewers from indecent broadcasting which "can intrude on the privacy of the home without prior warning as to program content" and 2) protecting children. In its discussion of Pacifica, the Sable Court stated:

> The Pacifica opinion also relied on the "unique" attributes of broadcasting, noting that broadcasting is "uniquely pervasive," can intrude on the privacy of the home without prior warning as to program content, and is "uniquely accessible to children . . . ." The private commercial telephone communications at issue here are substantially different from the public radio broadcasting at issue in

> Pacifica. * * *. There is no "captive audience" problem here; callers will generally not be unwilling listeners. The context of dial-in services . . . is manifestly different from a situation in which a listener does not wan the received message. Placing a phone call is not the same as turning on a radio and being taken by surprise. . . . [T]he message received by one who places a call to a dial-a-porn service is not so invasive or surprising that it prevents an unwilling listener from avoiding exposure to it.

492 U.S. at 127-28.

The Pacifica Court did not say that Carlin's monologue, as broadcast, was protected speech.1/ In Sable the question of whether indecent expression is protected by the First Amendment was not at issue. In Sable, the sole issue, as framed by the parties, was whether a total ban on what the parties considered as a form of protected expression could be justified solely on a protection of minors rationale. Further, in Sable the Court simply said that indecent communications cannot be criminalized "solely because they are indecent." Id. at 126. The Sable Court did not say that indecent material was protected in every context.

The Court of Appeals stated that it viewed this

1[W]e may assume, arguendo, that this monologue would be protected in other contexts." 438 U.S. at 746. See also, "Although the First Amendment may require unwilling adults to absorb the first blow of offensive . . . speech when . . . in public . . ., a different order of values obtain in the home. * * *. This is not to say . . . the [FCC] has an unrestricted license to decide what speech, protected in other media, may be banned from the airwaves . . . but its judgment is entitled to respect." 438 U.S. at 759-60 (Powell, J., concurring) (emphasis added).

Court's decision in Sable as adding credence to its decision that indecent broadcasting could be prohibited twenty-four hours per day. This interpretation of the precedential value of Sable and the lack of precedential value of Pacifica is the root of the Court of Appeal's error.

C. THIS COURT'S DECISION IN PACIFICA REMAINS THE LAW OF BROADCAST INDECENCY AND THE COURT OF APPEALS ERRED WHEN IT IGNORED THIS COURT'S PREVIOUS DECISION.

In its decision, the Court of Appeals ignored the holding and applicability of this Court's decision in Pacifica. The decision of the court below was based on "circuit precedent" which compelled the "rejection . . . . of a total ban on the broadcast of indecent material." Action for Children's Television v Federal Communications Commission, 932 F.2d 1504, 1508 (D.C. Cir. 1991). The holding of this Court in Pacifica is clear as to the role broadcast indecency plays in the scheme of the First Amendment hierarchy. "[T]he constitutional protection accorded to a communication containing such patently offensive sexually and excretory language need not be the same in every context." 438 U.S. at 747.

The Court in Pacifica identified two primary reasons for upholding the restrictions on indecent broadcasting. The first was that "the broadcast media have established a uniquely pervasive presence in the lives of all Americans." Id. at 748. The second was that "broadcasting is uniquely accessible to children, even those too young to read." Id. at 749.

In concluding the Court recognized that the "Commission's decision rested entirely on a nuisance rationale under which context is all-important. The concept

requires a consideration of a host of variables. The time of day . . . the composition of the audience, and differences between radio, television, and perhaps closed-circuit transmissions." Id. at 750.

The decision of the Court of Appeals in this matter completely discounted the first consideration by this Court in Pacifica, namely, the pervasive of the medium and the intrusive nature of the indecent language into the private homes of unsuspecting listeners. The pervasiveness that this Court was concerned about in Pacifica has grown in magnitude and should be as much of, if not more of, a concern today than it was in 1978.

As the Commission noted in its Recommendation and Report, technological advances since 1978 have made the media more accessible and more immediately pervasive to individuals. The Commission considered the prevalence of video cassette recorders, portable radios and televisions and the increase in the number of stations or channels available to any one individual. None of these findings was recognized by the court below.

In fact, the decision of the Court of Appeals is inapposite to the holding of this Court in Pacifica. The Pacifica Court acknowledged that the Commission was well within its authority to proscribe indecent speech. Nowhere in its opinion did the Court suggest or intimate that the Commission would be required to provide a space on the airwaves for indecent speech. The Pacifica Court's findings were based upon those of the Commission with specific reference to the statements of Commissioners Robinson and Hooks who stated that "'indecency' is not an inherent attribute of words themselves; it is rather a matter of context and conduct." 438 U.S. at 732, n.6. This language clearly contemplates a nuisance rationale rather than the adoption of a "safe harbor" by the Commission.

D. MORE RECENT DECISIONS BY THIS COURT ON THE SUBJECT OF PUBLIC INDECENCY SUPPORT THE COURT'S DECISION AND RATIONALE IN PACIFICA.

In addition, since the decision by the court below in this case, this Court has rendered its decision in Barnes v Glen Theatre, Inc., 501 U.S._____, 115 L.Ed.2d 504 (1991). In Barnes, this Court discussed, in the context of regulating public nudity and nude performances and found that "the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so." 115 L.Ed.2d at 511. This Court found that the state could legitimately prohibit public nudity as a "societal disapproval of nudity in public places and among strangers." Id. at 515.

These observations, coupled with this Court's previous decision in Pacifica, lead to the conclusion that the Federal Communications Commission, using a nuisance rationale, could constitutionally prohibit the broadcast of indecent material. In finding otherwise, the Court of Appeals erred. For these reasons, this case presents important issues of federal law which should be settled by this Court. U.S. Sup. Ct. R. 10.l(c).

III. IS THE PROHIBITION IN TITLE 18 UNITED STATES CODE, SECTION 1464 REGARDING INDECENT LANGUAGE AN "INDECENT FOR

A. THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF

THIS COURT, TO-WIT: THAT GOVERNMENT MAY SUPPRESS INDECENT BROADCAST ONLY TO THE EXTENT NECESSARY TO PROTECT CHILDREN.

In ACT I, a panel of the Federal Circuit upheld the FCC's "generic definition" of "indecent" in light of the "sole purpose of that definition: to permit the channeling of indecent material inorder to shelter children...." Id., at 852 F.2d 1340. In ACT II, a second panel of the Federal Circuit, after indicating that the Commission "may only do that which is necessary to restrict children's access to indecent broadcasts," vacated the FCC order under review and directed the FCC to "carefully...address the specific concerns we raised in ACT I." ACT II, 932 F.2d at 1510.

The prohibition in 18 U.S.C. 1464 on indecent broadcast, however is not based on a "harmful to minors" standard. Unlike the standard upheld in Ginsberg v. New York, 390 U.S. 629 (1968), which was aimed at protecting minors from material harmful to them, the prohibition on obscene or "indecent" broadcast was enacted by Congress to protect all of the American people.

The concept of "indecent" is inextricably linked to that which of offends societal standards of propriety, modesty and morality and has never been based solely or primarily on what is appropriate for minors, See, e.g., Barnes v. Glen Theatre, Inc.,115 L.Ed. 2d at 512 (1991) ("Public indecency statutes were designed to protect public morality and public order"). As this Court noted in Pacifica, the "normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality." Id., at 438 U.S. 740. The Commission' s narrow definition of "indecent" emerged essentially as the second prong of the obscenity set forth in Miller v. California, 413 U.S. 15 (1973). Even before Miller,

as the Pacifica Court noted at 438 U.S. 740, n. 15, Justice Harlan equated indecency with the concept of patent offensiveness when he stated:

> "These magazines cannot be deemed so offensive on their face as to affront current community standards of decency – a quality that we shall hereafter refer to as 'patent offensiveness' or 'indecency.'" Manual Enterprises, Inc. v. Day, 370 U.S. 478, 482 (1962).

In Pacifica, this Court recognized that the indecency standard in 18 U.S.C. is an "INDECENT FOR ALL" standard which is determined for a mixed audience of both adults and children and that government has a valid interest in protecting unwilling adults from patently offensive, indecent material presented over the airwaves, which confronts them not only in public but also in the privacy of the home where the individuals right to be left alone plainly outweighs the First Amendment rights of an intruder. Id., at 748-49; id., at 759-60 (Powell, concurring). This Court has never "disavowed" this important government interest in protecting unwilling adults in the privacy of the home from indecent broadcast. Frisby v. Schultz, 487 U.S. 474, 485 (1988); Sable Communication of California, Inc. v. FCC, 492 U.S. 115, 127 (1989).

Under the holding in ACT II, the prohibition on broadcast indecency in 18 U.S.C. 1464 – which was enacted to protect ALL AMERICANS *and which has* been narrowly defined by the FCC to be largely limited to material that is the subject of the second-prong of the ADULT obscenity test – can now only be enforced to the extent necessary to protect CHILDREN.

IV. DOES THE DECISION OF THE COURT BELOW, REQUIRING THE FEDERAL COMMUNICATIONS COMMISSION TO DEMONSTRATE THAT THE RESTRICTION ON INDECENT BROADCASTING IS THE LEAST RESTRICTIVE MEANS OF FURTHERING A COMPELLING GOVERMENTAL INTEREST, COMPORT WITH FEDERAL COMMUNICATIONS COMMISSION V PACIFICA FOUNDATION, 438 U.S. 726 (1978), AND FEDERAL COMMUNICATIONS COMMISSION V LEAGUE OF WOMEN VOTERS, 468 U.S. 364 (1984), BOTH OF WHICH APPLIED A DIFFERENT STANDARD OF REVIEW TO THE BROADCAST REGULATION AT ISSUE?

A. THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT, TO WIT: THAT THE FCC MUST SHOW THAT THE 24-HOUR-A-DAY PROHIBITION ON INDECENT BROADCAST IS THE LEAST RESTRICTIVE MEAND OF FURTHERING A COMPELLING GOVERNMENTAL INTEREST.

In support of its holding, the ACT I panel cited this Court's decision in Consolidated Edison Co. v Public Service Comm'n, 447 U.S. 530 (1980), for the proposition that "content-based restrictions ordinarily 'may be sustanined only

if the government can show that the regulation is a precisely drawn means of serving a compelling state interest.'" ACT I, at 852 F.2d 1343, n. 18. In Consolidated Edison, this Court invalidated an order of the New York State Public Service Commission which struck "at the heart of the freedom to speak." Id., at 447 U.S. 535. In support of its holding, the Court in Consolidated Edison cited First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978)—a case which was decided the same year a Pacifica and which involved speech "at the heart of the First Amendment" and government action that "suggest[ed] an attempt to give on side of a debatable question an advantage in expressing its views to the people...." Bellotti, at 435 U.S. 776, 785.

In Consolidated Edison, however, this Court also said that governmental regulation "based on subject matter has been approved in narrow circumstances" and cited Pacifica as an example of courts looking "to the content of expression" when asked to determine "whether a species of speech is covered by the First Amendment." Consolidated Edison, at 447 U.S. 538, n. 5. In Pacifica, this Court distinguished Bellotti, recognizing that the prohibition on indecent broadcast is not aimed at the content of serious communication but rather on the way in which the point of view is expressed. Pacifica, at 746, notes 21 and 22; Bethel School District No. 403 v. Fraser, 478 U.S. 675, 682-83 (1986) ("certain modes of expression are inappropriate and subject to sanction"). In Pacifica, this Court did not subject the Commission's indecency order to "exacting scrutiny"—as it did the regulations in Bellotti and Consolidated Edison.

In support of its holding, the ACT II panel cited this Court's decisions in Consolidated Edison and Sable, for the proposition that government "'may regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.'" ACT II, 932 F.2d at 1509. In

Sable, however, this Court also recognized that the Pacifica opinion "relied on the 'unique' attributes of broadcasting, noting that broadcasting its 'uniquely pervasive,' can intrude on the privacy of the home without prior warning as to program content, and is 'uniquely accessible to children...." Sable, at 127.

In FCC v. League of Women Voters of California, 468 U.S. 364 (1984), this Court noted that because broadcast regulation involves such "unique considerations," its decision have "never gone so far as to demand that such regulations serve 'compelling' governmental interesting" [emphasis supplied]. Id., at 376. Of Pacifica, the Court in League of Women Voters of California said at 468 U.S. at 380, n. 13:

> "There, the Court focused on certain physical characteristics of broadcasting – specifically, that the medium's uniquely pervasive presence renders impossible any prior warning for those listeners who may be offended by indecent language, and second, that the ease with which children may gain access to the medium, especially during daytime hours, creates a substantial risk that they may be exposed to such offensive expression...."

Unlike the contest of the telephone "dial in" service, where adults do choose to receive the communication, the broadcast medium's pervasive presence renders impossible an informed decision to receive or reject an indecent broadcast, and when "expression occurs in a setting where the capacity to make a choice is absent, government regulation of that expression may co-exist with and even implement First Amendment guarantees." Ginsberg v. New

York, 390 U.S. 629, 649 (1976) (Stewart, J., concurring). To say that an offended listener may simply turn the channel does "not avoid a harm that has already taken place." Pacifica, at 438 U.S. 749. A child – like someone in a captive audience – is not deemed to possess that "full capacity for individual choice which is the presupposition of First Amendment guarantees." Ginsberg v. New York, at 390 U.S. 649-50 (Stewart, J., concurring).

An article by Paul J. McGeady entitled "Obscenity Law and the Supreme Court," in Where Do You Draw The Line, pp. 102-103 (V. Cline, ed 1974), explains why a prohibition on indecent broadcast is absolutely necessary to protect the American people, especially children, from the psychological ravages of pornography and to protect the moral fabric of society:

> "Does not the Supreme Court['s Miller] opinion say the you can present explicit hard-core sex...on TV if the 'play' or 'film' or 'live performance' has literary or artistic value? It would appear that most Americans obviously would not tolerate this. While they might tolerate these distinctions in books, magazines, or even motion pictures, they would not tolerate the concept that they must switch the dial to avoid such performances on TV or radio or that they must be concerned that their minor children may be exposed to the same. ...It is quite obvious that different standards must be applied to TV and radio.... Television and radio communications certainly partake of the nature of a public access thoroughfare (albeit an electromagnetic one) and what may be prohibited on the public street should be equally prohibited on TV and radio. This includes undoubtedly all soft-core

> or hard-core sexual, explicit conduct as well as nudity. These programs come into the home, and under the doctrine of Breard v. Alexandria, 342 U.S. 622 (1951), the usual broad play afforded free speech may be curtailed. What is the quality in public nudity that permits the law to inhibit it without proof of obscenity? ...We suggest that the quality involved is 'Intrusiveness' (as in Breard). ...Just as a citizen is entitled to walk down the public street without the necessity of having to avert his eyes to avoid a public nude performance, so too he is entitled to 'flip the dial' without viewing intrusive nudity or explicit hardcore sex. Is he supposed to review the program for 30 minutes or one hour to determine if the work 'taken as a whole' has [serious] value? Most probably the Supreme Court did not intend this result and is awaiting the opportunity to correct this deficiency as soon as a proper case in this area presents itself for adjuction. In the meantime, we are left with an anomoly."

A. THE GOVERNMENTAL INTEREST IS SUBSTANTIAL--EVEN COMPELLING--AND THE ONLY MEANS OF FURTHERING SAID INTERESTS IS TO RESTRICT THE PROBLEM AT ITS SOURCE.

As the result of the District of Columbia Circuit Court of Appeals' opinion of May 17, 1991, indecent materials – that is, "language or material that, in context, depicts or

describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs" — may be broadcast during "channeled" time period, probably the late evening hours and early morning.

Petitioners consider this decision to be of great public importance in that it affects large numbers of persons and involves fundamental constitutional rights. Indecent material, constitutes a wide range of programming that may now find its way into millions of Americans' living rooms each night, assaulting adults and harming children. Since only materials which are deemed obscene pursuant to Miller v California, 413 U.S. 15 (1973) will be prohibited from being broadcast over television and radio during these later night and early morning hours, much programming considered offensive by millions — full nudity, sexual intercourse, masturbation, orgies, sado-masochistic abuse, and so on — will now assault adults and children alike. The only defense left by the Court's decision is to turn off the switch, which is always after "absorbing the first blow" in their own homes or cars.

1. The government's interest in the protection of residential privacy

The Supreme Court has long recognized that each means of speech or expression presents unique First Amendment problems. Joseph Burstyn, Inc. v Wilson, 343 U.S. 495 (1952). Broadcasting, of all the forms of communications, receives the least First Amendment protection. FCC v Pacifica Foundation, 438 U.S. 726, 747 (1978). In Pacifica, the Court explained why this is the case:

> First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. . . . Second, broadcasting is

> uniquely accessible to children, even those too young to read.

438 U.S. at 748-49.

In discussing the first reason or basis ("pervasive presence") for the lesser protection of broadcast, the court emphasizes the individual's right to be "left alone" in the privacy of the home.

The protection of residential privacy is well-established in a long line of Supreme Court cases as being an important and significant government interest. In Rowan v United States Post Office, 397 U.S. 728, 736 (1970), the Court examined the challenged statute in light of the First Amendment by balancing "the right of every person 'to be let alone' . . . with the right of others to communicate." In doing so, the Court stated:

> In today's complex society, we are inescapably captive audiences for many purposes, but a sufficient measure of individual autonomy must survive to permit every householder to exercise control over unwanted mail. . . . The ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another.

397 U.S. 736-37 (emphasis added).

Again, in Carey v Brown, 447 U.S. 455 (1980), and Frisby v Schultz, 487 U.S. 474 (1988), the Supreme Court recognized the importance of residential privacy when examining statutes which barred picketing of residences: "In all such cases, we have been careful to acknowledge that

unwilling listeners may be protected when within their own homes. . . . There simply is no right to force speech into the home of an unwilling listener." Frisby, 487 U.S. at 485.

Finally, the Court noted in Pacifica that:

> Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder.

438 U.S. at 748.

Therefore, as demonstrated by this line of Supreme Court cases, the right "to be left alone" in one's own home is an important governmental interest, which is violated by the Court of Appeals' ruling in this case.

2. The government's interest in the well-being of children and supporting parents in their child-rearing duties justifies a 24-hour proscription of indecent broadcast

In addition to the preservation of the sanctity of the home and protecting adults from unwanted assaults of offensive materials, the government has additional important and substantial interests – indeed, compelling interests: protection of the physical and psychological well-being of children and support of parental supervision and child-rearing duties.

The Supreme Court has recognized these governmental interests in upholding a number of statutory schemes. In Ginsberg v New York, 390 U.S. 629, 639-40 (1968), the Court found the governmental interests in supporting parents and in the well-being of its youth to be so compelling that the Court approved legislation which

shielded minors from the influence of material that was not obscene by adult standards.

In Sable, 492 U.S. 115 (1989), the Court, while examining the problems associated with dial-a-porn, again "recognized that there is a compelling interest in protecting the physical and psychological well-being of minors." New York v Ferber, 458 U.S. 747, 756-57 (1982) further recognizing these interests in our nation's children as substantial and "compelling," in discussing the problem of child pornography.

The report of the FCC found that children were in the broadcast audience at all hours of the day and night – on a twenty-four hour basis. The FCC further concluded that the saturation of American society by the broadcast media, coupled with other relevant factors, makes "effective parental supervision exceedingly difficult, if not impossible, for the average parent." Report of the Commission, p. 27, ¶61.

Because parental supervision is an impossibility and because of the pervasiveness of the problem, the only way to protect children, aid parents in their child-rearing duties, and protect residential privacy, is to restrict indecent broadcast at its source – that is, proscribe it on a 24-hour basis. Of course, nothing bars parents who so desire from providing sexually explicit and offensive materials to their offspring by other means.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioners

November 26, 1991

91-583

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1991

CHILDREN'S LEGAL FOUNDATION, INC. AND
AMERICAN FAMILY ASSOCIATION, INC.,
PETITIONERS,
FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA
V.
ACTION FOR CHILDREN'S TELEVISION, et al.,.
RESPONDENTS

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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APPENDIX

RELEVANT STATUTORY PROVISION

§ 1464. Broadcasting Obscene Language

Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both.

ACTION FOR CHILDREN'S TELEVISION, et al.,
Petitioners,
v.

FEDERAL COMMUNICATIONS COMMISSION and
United States of America,
Respondents,

Children's Legal Foundation, et
al., Intervenors.

No. 88-1916.

United States Court of Appeals,
District of Columbia Circuit.

Argued Jan. 28, 1991.
Decided May 17, 1991.

On petition for review of an order of the Federal Communications Commission (FCC), the Court of Appeals, Mikva, Chief Judge, held that FCC's order, promulgated at direction of Congress, barring all radio and television broadcasts of "indecent" material violated First Amendment. Petition granted; order vacated; remanded.

Constitutional Law ~90.4(3)
Telecommunications ~383
Federal Communications Commission's (FCC's) order, promulgated at direction of Congress, barring all radio and television broadcasts of "indecent" material violated First Amendment; there must be safe harbor periods during which indecent material may be broadcast. 18 U.S.C.A. § 1464; U.S.C.A. Const.Amend. 1.

Petition for Review of an Order of the Federal Communications Commission.

Timothy B. Dyk, for petitioner and for Capital Cities/ABC, Inc., and CBS, Inc., with whom Henry Geller and Donna Lampert, for Action for Children's Television, John A. Powell and C. Edwin Baker, for American Civ. Liberties Union, James Popham, for Ass'n of Independent Television Stations, Inc., Steven A. Lerman, Dennis P. Corbett, and Laura B. Humphries, for Infinity Broadcasting Corp., Fritz E. Attaway, for Motion Picture Ass'n of America, Inc., Henry L. Baumann and Stephen A. Bookshester, for Nat. Ass'n of Broadcasters, Howard Monderer, for Nat. Broadcasting Co., Inc., Theodore A. Miles and Karen Christensen, for Nat. Public Radio, Andrew Jay Schwartzman and Jan G. Levine, for People for the American Way, Jonathan D. Blake, for Post-Newsweek Stations, Inc., Paula A. Jameson and Nancy H. Hendry, for Public Broadcasting Service, J. Laurent Scharff, for Radio-Television News Directors Ass'n, Jane E. Kirtley, for The Reporters Committee for Freedom of the Press, and Bruce W. Sanford, for Soc. of Professional Journalists, were on the joint brief, for petitioners Action for Children's Television, et al. Molly Pauker, for Nat. Broadcasting Co., Inc., Lois Schiffer, for Nat. Public Radio, Martin Wald and Janet E. Milne, for Post-Newsweek Stations, Inc., and James M. Smith, for Radio-Television News Directors Ass'n, also entered appearances for petitioners.

Eric M. Lieberman, with whom John Crigler, William J. Byrnes, and Edward de Grazia, were on the brief, for petitioner The Pacifica Foundation and intervenors PEN American Center, Allen Ginsberg, et al.

Robert L. Pettit, Gen. Counsel, F.C.C., with whom Daniel M. Armstrong, Associate Gen. Counsel, Jane E. Mago, Sue Ann

Preskill, and Laurence N. Bourne, Counsel, F.C.C., and Barbara L. Herwig and Jacob M. Lewis, Attys., Dept. of Justice, were on the brief, for respondents.

James P. Mueller, for Children's Legal Foundation and American Family Ass'n, Peggy M. Coleman, for American Family Ass'n and Paul J. McGeady, for Morality in Media, Inc., were on the joint brief, for intervenors and amicus curiae.

Before MIKVA, Chief Judge, and EDWARDS and THOMAS, Circuit Judges.

Opinion for the Court filed by Chief Judge MIKVA.

MIKVA, Chief Judge:

This case presents constitutional challenges to a Federal Communications Commission ("FCC" or "the Commission") order, promulgated at the direction of Congress, barring all radio and television broadcasts of "indecent" material. We believe that the disposition of this case is governed by our prior decision in *Action for Children's Television v. Federal Communications Commission*, 852 F.2d 1332 (D.C.Cir.1988), in which we rejected vagueness and overbreadth challenges to the Commission's definition of indecency but found that the Commission's curtailment of "safe harbor" broadcast periods impermissibly intruded on constitutionally protected expression interests. Accordingly, we grant the petition for review.

I

The particulars of this case are best understood within the history of government efforts to regulate the broadcast of indecent material. Since 1927, federal law has prohibited the broadcast of "any obscene, indecent, or profane language."

18 U.S.C. § 1464 (1988); *see also* Radio Act of 1927, § 29, 44 Stat. 1172 (1927) (original prohibition against utterance of "obscene, indecent, or profane language"). In 1975, the Commission essayed to "authoritatively contrue[ ]" the term "indecent" and to distinguish it from the modern definition of obscenity, as formulated by the Supreme Court in *Miller v. California,* 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). *See Pacifica Found.*, 56 F.C.C.2d 94, 97 (1975). The Commission defined indecency as "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs," and emphasized that its primary regulatory interest lay in protecting children from "language which most parents regard as inappropriate for them to hear." *Id.* at 98. The Supreme Court upheld the Commission's finding that a radio station's afternoon broadcast of a George Carlin comedy monologue entitled "Filthy Words" was indecent under section 1464. *See Federal Communications Comm'n v. Pacifica Found.*, 438 U.S. 726, 738-41, 98 S.Ct. 3026, 3034-36, 57 L.Ed.2d 1073 (1978).

The Commission, by its own account, subsequently "took a very limited approach to enforcing the prohibition against indecent broadcasts." *In re Infinity Broadcasting Corp. of Pennsylvania,* 3 FCC Rcd 930 (1987) [hereinafter *Reconsideration Order].* The Commission essentially restricted its enforcement efforts to material broadcast before 10:00 p.m. that involved "the repeated use, for shock value, of words similar or identical to those satirized in the Carlin 'Filthy Words' monologue." *Id* at 930. Between 1975 and 1987, no broadcasts at all were found actionable under this narrow prohibition. *See id.*

By 1987, however, the Commission had concluded that "the highly restrictive enforcement standard employed

after the 1975 *Pacifica* decision was unduly narrow as a matter of law and inconsistent with our enforcement responsibilities under Section 1464." *Id.* Returning to the generic definition of indecency it had developed in *Pacifica*, the Commission issued three rulings declaring material that would not have violated the "Filthy Words" test to be indecent. *See Pacifica Found,* 2 FCC Rcd 2698 (1987); *The Regents of the Univ. of California,* 2 FCC Rcd 2703 (1987); *Infinity Broadcasting Corp. of Pennsyl7 ania,* 2 FCC Rcd 2705 (1987); *see also Neu Indecency Enforcement Standards to be Applied to All Broadcast and Amateur Radio Licensees,* 2 FCC Rcd 2726 (1987) (summarizing Commission policies). Significantly, two of the cited broadcasts had aired after 10:00 p.m., the time period pre~iously identified by the Commission as a "safe harbor" during which the risk of children in the broadcast audience was thought to be minimal. *See id.* at 2726. On reconsideration, the Commission affirmed its warnings with respect to the three broadcasts and noted, in response to requests for more specific rules regarding time channeling, that 12:00 midnight was its "current thinking" as to when the risk of children in the broadcast audience could reasonably be thought minimized. *See Reconsideration Order,* 3 FCC Rcd at 934, 937 n. 47.

Reviewing the Commission's order, we first rejected petitioners' vagueness and overbreadth challenges to the Commission's generic definition of indecency. *See Action for Children's Telel!ision v. FCC,* 852 F.2d 1332, 1338-40 (D.C.Cir.1988) [hereinafter *A CT I*]. However, we vacated the Commission's rulings that the two post-10:00 p.m. broadcasts were indecent. In addition to calling the Commission's findings "more ritual than real" and its underlying evidence "insubstantial," *Id.* at 1341-42, we opined that a "reasonable safe harbor rule" was constitutionally mandated. *Id.* at 1343 n. 18. Accordingly, we instructed the Commission to determine on remand, "after a full and fair

hearing, ... the times at which indecent material may be broadcast." *Id.* at 1344.

Before the Commission could carry out this court's mandate, Congress intervened. On October 1, 1988, two months after the *ACT I* decision issued, the President signed into law a 1989 appropriations bill containing the following rider:

> By January 31, 1989, the Federal Communications Commission shall promulgate regulations in accordance with section 1464, title 18, United States Code, to *enforce the provisions of such section on a 24 hour per day basis.*

Pub.L.No. 100-459, § 608, 102 Stat. 2228 (1988) (emphasis added). Concluding that "[t]he directive of the appropriations language affords us no discretion," the Commission promulgated a new rule pursuant to section 1464 prohibiting all broadcasts of indecent materials. *See Enforcement of Prohibitions Against Broadcast Obscenity and Indecency in 18 U.S.C. § 1464*, 4 FCC Rcd 457 (1988) [hereinafter *Order*], codified at 47 CFR § 73.3999 (1990) (restrictions on the transmission of obscene or indecent language). The Commission also "abandon[ed its] plans to initiate a proceeding in response to the concerns raised by" the *ACT I* panel. *Order*, 4 FCC Rcd at 457.

A panel of this court granted petitioners' motion to stay enforcement of the ban pending judicial review. *See Action for Children's Television v. FCC*, No. 88-1916 (D.C.Cir. Jan. 23, 1989). Six months later, while briefing on the validity of the Commission's order was underway in this court, the Supreme Court issued an opinion finding a blanket ban on indecent commercial telephone message services unconstitutional. *Sable Communications of Cal., Inc. v. FCC*,

492 U.S. 115, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989). Believing that *Sable* left open the possibility that indecent broadcasts may be proscribed if the Commission could prove that no less restrictive measure would effectuate the government's compelling interests, the Commission sought and obtained a remand from this court in order to assemble the relevant data supporting a total ban. *Action for Children's Television v. FCC, No.* 88-1916 (D.C.Cir. Sept. 13, 1989) (remanding record to the FCC for a "full and fair hearing on the issue of the propriety of indecent broadcasting").

The Commission subsequently solicited public comments on the validity of a total ban on broadcast indecency. *See Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. §* 1464, 4 FCC Rcd 8358 (1989). After receiving and reviewing the comments, the Commission issued a comprehensive report concluding that "a 24-hour prohibition on indecent broadcasts comports with the constitutional standard the Supreme Court enunciated in *Sable* for the regulation of constitutionally protected speech." *Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C.* § 1464, 5 FCC Rcd 5297, 5297 (1990). Finding a "reasonable risk that significant numbers of children ages 17 and under listen to radio and view television at all times" without "active" parental supervision, the Commission concluded that no alternative to a total ban would effectuate the government's compelling interest in protecting children from broadcast indecency. *See id.* at 5297, 5306. Current proceedings before this court followed issuance of the Commission's report.

II

Petitioners, an amalgam of broadcasters, industry associations, and public interest groups, present several constitutional challenges to the Commission's action. First, they claim (some more spiritedly than others) that the

Commission's definition of indecency is unconstitutionally vague and overbroad. Second, they contend that a total ban on broadcast indecency cannot withstand constitutional scrutiny. We address petitioners' contentions in turn.

A. Vagueness and Overbread th Challenges

Petitioners contend that the Commission's definition of indecency – "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs," *Order*, 4 FCC Rcd at 457 – is unconstitutionally vague. A statute or regulation is void for vagueness if it "'either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application.' " *Roberts v. United States Jaycees*, 468 U.S. 609, 629, 104 S.Ct. 3244, 3256, 82 L.Ed.2d 462 (1984) (quoting *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926)).

We have already considered and rejected a vagueness challenge to the Commission's definition of indecency. In *ACT I*, we noted that the Supreme Court, entertaining a similar challenge in Pacihca, had quoted various elements of the definition with approval and had ultimately affirmed the Commission's application of the definition to the broadcast under review. *See ACT I*, 852 F.2d at 1338-39. In our view, the Supreme Court's decision in Pacihca dispelled any vagueness concerns attending the definition. *See id.* at 1339 ("[I]f acceptance of the FCC's generic definition of 'indecent' as capable of surviving a vagueness challenge is not implicit in Pacihca, we have misunderstood Higher Authority and welcome correction."); *cf. Information Providers' Coalition v. FCC*, 928 F.2d 866, 874, (9th Cir.1991) (rejecting vagueness challenge to similar definition of indecency in

dial-a-porn context). Our holding in *ACT I* precludes us from now finding the Commission's generic definition of indecency to be unconstitutionally vague.

Some of the petitioners raise the additional claim that the definition of indecency is unconstitutionally overbroad. They contend that, because the Commission fails to recognize "serious merit" as an absolute defense to a charge of indecency, the definition sweeps even constitutionally protected expression within its ambit. *See Houston v. Hill*, 482 U.S. 451, 459 107 S.Ct. 2502, 2508, 96 L.Ed.2d 398 (1987) (noting that statutes "that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application").

We rejected an identical o- erbreadth challenge in *ACT I*. ' We noted that indecent material qualifies for First Amendment protection regardless of merit, but that even material with "significant social value" may leave a strong negative impact on children. *See ACT I*, 852 F.2d at 1340. We thus found the Commission's method of identifying material suitable for broadcast only during the late night, safe harbor hours — whereby merit is treated as a "relevant factor in determining whether material is patently offensive" but "does not render such material *per se* not indecent" — to be permissible. *See id.* at 1339-40. Given that our decision today reaffirms the need for safe harbor periods during which indecent material may be broadcast and invalidates the Commission's attempt to ban such broadcasts altogether, we have no reason to revisit *ACT I's* conclusion that the Commission's generic definition of indecency comports with constitutional overbreadth requirements.

B. *Challenge to Total Ban on Broadcast Ind ecency*

Petitioners' core challenge is to the constitutional validity of a total ban on the broadcast of indecent material. Their contentions are two-fold: First, they claim that, under Supreme Court and circuit precedent, the government may not completely suppress indecent speech in any medium. Second, they argue that even if a total ban could theoretically be justified, the Commission's action here fails to satisfy the strict scrutiny standard recently reaffirmed by the Supreme Court in *Sable*.

We agree with petitioners that circuit precedent compels our rejection today of a total ban on the broadcast of indecent material. In *ACT I*, we stated that:

> Broadcast material that is indecent but not obscene is protected by the first amendment; the FCC may regulate such material only with due respect for the high value our Constitution places on freedom and choice in what the people say and hear.

852 F.2d at 1344. Addressing the scope of permissible regulation, we explained that:

> Content-based restrictions ordinarily "may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." [citation omitted] The Supreme Court has recognized a government's interest in "safeguarding the physical and psychological well-being of a minor" as "compelling." [citations omitted] But that interest, in the context of speech control, may be served only by carefully-

tailored regulation.

Id. at 1343 n. 18.

We found that the Commission's elimination of the post-10:00 p.m. "safe-harbor" period failed to satisfy these constitutional standards. Specifically, we concluded that:

> [T]he precision necessary to allow scope for the first amendment shielded freedom and choice of broadcasters and their audiences cannot be accomplished, we believe, unless the FCC adopts a reasonable safe harbor rule.

Id. We therefore instructed the Commission, on remand, to "afford broadcasters clear notice of reasonably determined times at which indecent material safely may be aired." *Id.* at 1343.

Our holding in *ACT* I that the Commission must identify some reasonable period of time during which indecent material may be broadcast necessarily means that the Commission may not ban such broadcasts entirely. The fact that Congress itself mandated the total ban on broadcast indecency does not alter our view that, under *ACTI*, such a prohibition cannot withstand constitutional scrutiny. While "we do not ignore" Congress' apparent belief that a total ban on broadcast indecency is constitutional, it is ultimately the judiciary's task, particularly in the First Amendment context, to decide whether Congress has violated the Constitution. *See Sable,* 109 S.Ct. at 2838. Moreover, we note that introduction of the appropriations rider preceded issuance of our decision in *ACT I;* thus, the relevant congressional debate occurred without the benefit of our constitutional holding in that case. *See* 134 CONG. REC. S9911-S9915 (daily ed. July 26,

1988).

Nothing else in the intervening thirtyfour months has reduced the precedential force of *ACT I*. Indeed, the Supreme Court's decision in *Sable*, striking down a total ban on indecent commercial telephone messages, affirmed the protected status of indecent speech and reiterated the strict constitutional standard that government efforts to regulate the content of speech must satisfy. *See Sable*, 109 S.Ct. at 2836 (noting that "[s]exual expression which is indecent but not obscene is protected by the First Amendment," and stating that the government may "regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest"). *See also Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 540, 100 S.Ct. 2326, 2334, 65 L.Ed.2d 319 (1980). Even the Commission, prior to congressional enactment of the appropriations rider, shared this view. *See Reconsideration Order*, 3 FCC Rcd at 931 (dismissing suggestion that section 1464 should be read to totally prohibit the broadcast of indecent material, as such a reading would "run afoul of [the] constitutional premise" that the Commission "may only do that which is necessary to restrict children's access to indecent broadcasts" and "may not go further so as to preclude access by adults who are interested in seeing or hearing such material").

Thus, neither the Commission's action prohibiting the broadcast of indecent material, nor the congressional mandate that prompted it, can pass constitutional muster under the law of this circuit.

III.

We appreciate the Commission's constraints in responding to the appropriations rider. It would be unseemly

for a regulatory agency to throw down the gauntlet, even a gauntlet grounded on the Constitution, to Congress. But just as the FCC may not ignore the dictates of the legislative branch, neither may the judiciary ignore its independent duty to check the constitutional excesses of Congress. We hold that Congress' action here cannot preclude the Commission from creating a safe harbor exception to its regulation of indecent broadcasts.

Our decision today effectively returns the Commission to the position it briefly occupied after *ACT I* and prior to congressional adoption of the appropriations rider. The Commission should resume its "plans to initiate a proceeding in response to the concerns raised" in *ACT I*, which it "abandon[ed]" following Congress' mandate. *Order*, 4 FCC Rcd at 457. We direct the Commission, in "redetermin[ing], after a full and fair hearing, ... the times at which indecent material may be broadcast," to carefully review and address the specific concerns we raised in *ACT I*: among them, the appropriate definitions of "children" and "reasonable risk" for channeling purposes, the paucity of station- or program specific audience data expressed as a percentage of the relevant age group population, and the scope of the government's interest in regulating indecent broadcasts. *See ACT I*, 852 F.2d at 1341-44.

For the foregoing reasons, the petition for review is granted, the order under review is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1916 September Term, 1990

Action for Children's Television, et al.,
Petitioners

v.

Federal Communications Commission,
and United States of America,
Respondent

BEFORE: Mikva, Chief Judge; Wald, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg, Sentelle, Thomas, Henderson and Randolph, Circuit Judges

O R D E R

The Suggestions For Rehearing En Banc filed by the Federal Communications Commission and Intervenors and the responses thereto have been circulated to the full court. No member of the Court requested the taking of a vote. Upon consideration of the foregoing it is

ORDERED, by the Court en banc, that the suggestions are denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY:

Robert A. Bonner
Deputy Clerk

Circuit Judge Ruth B. Ginsburg did not participate in this matter.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of		
Enforcement of Prohibitions	)	
	)	MM Docket No. 89-494
Against Broadcast Indecency in	)	
18 U.S.C. § 1464	)	

REPORT OF THE COMMISSION
(Proceeding Terminated)

Adopted: July 12, 1990; Released: August 6, 1990

By the Commission: Commissioner Quello concurring and issuing a statement.

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I. INTRODUCTION

1. In this report we respond to a remand of the record granted by the U.S. Court of Appeals for the District of Columbia Circuit in Action for Children's Television v. FCC (ACT II).1/ In its remand order, the court directed the Commission to conduct a "full and fair hearing" on the constitutionality of a statutory provision2/ which requires the Commission to prohibit the broadcast of indecent material 24 hours a day.3/ The court granted the remand in light of the Supreme Court's recent decision in Sable Communications of California, Inc. v. FCC (Sable),4/ which held that government may regulate indecent speech if the regulation promotes a "compelling" government interest and is "narrowly tailored" to serve that interest. The Commission accordingly issued a Notice of Inquiry (NOI)5/ to solicit

1 No. 88-1916 (D.C. Cir. Sept. 13, 1989).

2 The Commission's 1989 appropriations law states: "By January 31, 1989, the Federal Communications Commission shall promulgate regulations in accordance with section 1464, title 18, United States Code, to enforce the provisions of such section on a 24 hour per day basis." Making Appropriations for the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies for the Fiscal Year Ending September 30, 1989, and for Other Purposes. Pub. L. No.-100-459,§ 608, 102 Stat.-2186, 2228 1988).

3 Enforcement of the FCC regulation promulgating the 24-hour prohibition, codified at 47 C.F.R. § 73.3999 (1989), was stayed pending judicial review by the court in ACT II.

4 109 S. Ct. 2829 (1989).

5 4 FCC Rcd 8358 (1989).

public comment on issues relevant to analyzing the validity of the 24-hour indecent broadcasting prohibition in view of the Sable decision.6/

2. After careful consideration of the responses to our inquiry, we conclude that a 24-hour prohibition on indecent broadcasts comports with the constitutional standard the Supreme Court enunciated in Sable for the regulation of constitutionally protected speech. First, the Supreme Court has expressly recognized the government's compelling interest in protecting children from broadcast indecency, both to facilitate parental supervision and to promote the well-being of children who may be exposed to indecent material. Moreover, the narrowness with which courts have interpreted "obscenity" has commensurably broadened the range of patently offensive material that could be deemed "indecent" if broadcast, rendering the government interest in protecting children even more compelling. Second, the record in this proceeding reveals that no alternative to a 24-hour prohibition on indecent broadcasts would effectively serve this government interest. The best available evidence indicates that there is a reasonable risk that significant numbers of children ages 17 and under listen to radio and view television at all times of day and night. Neither time channeling nor ratings and warning devices permit effective

6/ We received over 92,500 formal and informal responses to our NOI. Almost 88,000 informal letters supported a 24-hour prohibition, while approximately 4,500 letters opposed it. Formal commenters are listed in Appendix A, and the informal comments have been placed in the docket file. American Family Association et al. (AFA) filed its reply comments one day late. In the interest of assembling a full and complete record, and the lack of prejudice resulting to any party, we will accept those comments.

parental control over these activities, and technologies that may permit control are not currently available. On the other hand, indecent material similar to that broadcast is readily available on other media over which parents can exercise control. Accordingly, we conclude that the compelling government interest in protecting children from indecent broadcasts would not be promoted effectively by any means more narrowly tailored than a 24-hour prohibition.

3. We recognize, however, that there may be instances in which children are not in the broadcast audience at a given time of day in a given market. We therefore have decided to modify our enforcement procedures to permit stations accused of airing indecent material to demonstrate that children in fact are not present in the broadcast audience in their market at the time the alleged indecent program was aired. We believe that, as thus enforced, the 24-hour prohibition against broadcast indecency clearly meets the narrowly tailored criteria applied by the Supreme Court in Sable.

II. BACKGROUND

4. This proceeding addresses Section 1464 of the Criminal Code, 18 U.S C. § 1464 (1988), first enacted by the Radio Act of 1927, reenacted by the Communications Act of 1934, and later codified in the Criminal Code. Throughout this period of more than 60 years, Section 1464 and its identical predecessor provisions have prohibited the broadcast of indecent language. Since 1934, the Commission has been authorized by the Communications Act to enforce Section 1464's provisions by, among other things, assessing

forfeitures for its violation.7/

5. In 1978, the Supreme Court affirmed the Commission's enforcement of Section 1464's prohibition on indecent broadcasting, including the Commission's definition of indecent language.8 F.C.C. v. Pacifica Foundation (Pacifica), 438 U.S. 726 (1978); See also, Action for Children's Television v. F.C.C., 852 F.2d 1332, 1339 (D.C. Cir. 1988) (ACT I). In Pacifica, the Court also reaff irmed its holding in Ginsberg v. New York 9/"that the government's interest in the ' well-being of its youth' and in supporting 'parents' claim to authority in their own household' justified regulation of otherwise protected expression." The Court found that these concerns, along with the broadcast media's uniquely pervasive presence and unique access to children)justified special treatment of the broadcast of indecent material. Id. at 748-749.

6. In ACT I, the D.C. Circuit Court affirmed the Commission's action in one case involving the daytime

7 See 47 U.S.C. § 312(a)(6) and (b), 503 (b)(l)(D) (1988).

8 The Commission 's definition of indecent language remains "language that describes in terms-patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." Pacifica Foundation, 56 FCC 2d 94, at 98, 100 (1975). In our Reconsideration Order we explained that we separately consider the nature of the material involved and the time of broadcast because – the time of broadcast is pertinent to whether the broadcast is actionable, rather than to whether it is indecent. See 3 FCC Rcd 930, 936 n.6 (1987); ACT I at 1338 n.8.

9 390 U.S. 629 (1968). In Ginsberg, the Court upheld a state statute that prohibited the sale to minors (17 and under) of sexual material deemed by the legislature to be obscene as to children.

broadcast of indecent material, but remanded for further explanation two other cases involving broadcasts aired after 10 p.m. In the two cases remanded, the court found that the Commission had not adequately justified its narrowing the "safe harbor" during which indecent material could be broadcast from the hours of 10 p.m. - 6 a.m. to midnight 6 a.m. The court also rejected the Commission's suggestion that channeling decisions could be made on a case-by-case basis, finding that such an approach could have a chilling effect on broadcasters' exercise of their First Amendment rights . Thus, the court directed the Commission to afford broadcasters clear notice of reasonably determined times at which indecent material safely may be aired.

7. Shortly after the ACT I decision, Congress directed the Commission to enforce the broadcast indecency provisions of Section 1464 on a 24-hour basis.10/ In response, the Commission promulgated the rule which now is at issue in this case.11/ A number of petitioners challenged the rule, and on January 23, 1989, the D.C. Circuit in ACT II stayed its implementation pending judicial review.

8. Before briefing and oral argument had occurred on the merits of the 24-hour prohibition, the Supreme Court, in its Sable decision, addressed the extent to which the government may regulate indecent telephone messages. After noting that indecent speech is protected by the First Amendment, the Supreme Court nevertheless affirmed that

10 See n . 2, supra .

11 47 CFR § 73.3999 (1989) . See Order in Enforcement of Prohibitions Against Broadcasting Obscenity and Indecency in 18 U.S.C. 1464, 4 FCC Rcd 457 (1988).

"[t]he government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." Sable, 109 S. Ct. at 2836. Restating the point later in its opinion, the Court described the relevant constitutional standard as requiring that the means chosen by the government be "carefully tailored" or "narrowly tailored" to achieve the regulatory ends. Id. at 2839.

9. The Supreme Court in Sable distinguished the telephone medium from the broadcast medium, noting that "unlike an unexpected outburst on a radio broadcast, the message received by one who places a call to a dial-a-porn service is not so invasive or surprising that it prevents an unwilling listener from avoiding exposure to it." 109 S. Ct. at 2837. Also, in a concurring opinion, Justice Scalia suggested that indecent broadcasts could be prohibited if data demonstrate "the infeasibility of alternate means to provide . . . adequate protection of minors." Id. at 2840 (Scalia, J., concurring).

III. DISCUSSION

10. As noted above, based on the record in this proceeding and the Court's decision in Sable, we believe that the Commission's enforcement of a 24-hour prohibition on indecent broadcast programming comports with the First Amendment. Using the "compelling interest/narrowly tailored" standard set forth in Sable, we conclude that a 24-hour prohibition is the most narrowly tailored means of effectively promoting the government's compelling interest - in protecting children from broadcast indecency because there is a reasonable risk that a significant number of children are in the broadcast audience at all times of day and night. In

addition, we find that: (1) "children" are appropriately defined as minors 17 and under; (2) the government has a compelling interest in regulating children's access to indecent broadcast material, as the courts and Congress consistently have found; (3) our definition of indecency is not vague or overbroad and, in fact, repeatedly has been upheld by the courts; (4) other alternatives for protecting children, such as ratings, warning devices, or lock-out mechanisms would be ineffective; (5) because the risk of exposure to children exists even in the late evening and early morning hours, a time channeling approach would not protect children from indecent broadcast materials; and (6) adults have alternative sources of indecent materials. In order to tailor our enforcement of the 24-hour prohibition on indecent broadcasting as narrowly as possible, however, in actual cases of alleged indecent broadcasting stations will be permitted to demonstrate that children were not in fact present in the broadcast audience for the market at the time the programming at issue aired.

A. Constitutional Standard

11. Several parties argue that the constitutionality of the indecency prohibition should be judged under the time, place and manner standard, rather than the more rigorous compelling interest/narrowly tailored standard applied by the Supreme Court in Sable.12/ However, based upon the Supreme Court's having applied the more demanding test in Sable, and similar views expressed by the D.C. Circuit in ACT I that content-based restrictions are sustainable only if "the regulation is a precisely drawn means of serving a compelling state interest,"13/ we believe it appropriate to

12 Morality in Media (MIM) Comments at 23-32, Salem Communications Corporation and Focus on the Family (Salem) Reply Comments at 24-27.

apply the more rigorous standard.

12. It is well established that the First Amendment does not protect obscene speech, and that therefore the government has broad authority to regulate commerce in obscenity without reference to First Amendment principles. Sable, 109 S. Ct. at 2835; Paris Adult Theatre I v. Slaton, 413 U.S. 49, 69 (1973); Roth v. United States, 354 U.S. 476, 481 (1957). In contrast, as the Supreme Court observed in Sable, "[s]exual expression which is indecent but not obscene is protected by the First Amendment. . . ." 109 S. Ct. at 2836. See also Pacifica, 438 U.S. at 743 (Stevens, J.), 756 (Powell, J.). Nonetheless, the Supreme Court has indicated that it will uphold governmental regulation of indecent speech if the regulation meets the constitutional standards that the Court has articulated.

13. In Sable, the Court set forth the constitutional standard that governs restrictions on protected speech: the government may "regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." 109 S. Ct. at 2836. The Court also stated that the means chosen by the government must be "carefully tailored" or "narrowly tailored" to achieve the regulatory ends. Id. at 2836, 2839. While the standard has been expressed with

13 ACT I at 1343 n.18, quoting Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, 540 (1980).

somewhat different wording,14/ we understand it to require, essentially, a showing that the regulation or statute serves a compelling governmental interest and is narrowly tailored to serve that interest. This standard is substantially more rigorous than the time, place and manner test applied to content-neutral regulation of speech,15/ which requires only that the regulation be a reasonable means of serving "a significant governmental interest" and that it leave "ample alternative channels for communication." Consolidated Edison Co. of New York v. Public Service Commission of New York, 447 U.S. at 535. See also Clark v. Community for Creative Nonviolence, 468 U.S. 288, 293 (1984); Regan v. Time, Inc., 468 U.S. 641, 648 (1984).

B. Governmental Interest

14. In effectuating our statutory mandate, our primary concern has been and remains the protection of children from

14 Cf. United States v. Grace, 461 U.S. 171, 177 (1983) (regulation must be "narrowly drawn to accomplish a compelling governmental interest"); Consolidated Edison Co. of New York v. Public Service Commission of New York, 447 U.S. 530, 540 (1980) (regulation must be "a precisely drawn means of serving a compelling state interest"); Schaumberg v. Citizens for a Better Environment, 444 U.S. 620, 637 (1980) (law invalid because state's interest could be "served by measures less intrusive"); Cornelius v. NAACP Legal Defense and Educational Fund, 473 U.S. 788, 800 (1985) (state can exclude speakers if "compelling state interest" and "narrowly drawn exclusion"); Perry Education Association v. Perry Local Educators Association, 460 U.S. 37, 45 (1983) (government must show that "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end"); and First National Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978) ("closely drawn to avoid unnecessary abridgment," quoting Buckley v. Valeo, 424 U.S. 1, 25 (1976) (per curiam)).

15 See Act I at 1343 n.18.

exposure to indecent materials. See 134 Cong. Rec. S9912 (daily ed. July 26, 1988) (statement of Senator Helms); Reconsideration Order, 3 FCC Rcd 930, 931 (1987), aff'd in relevant part sub nom. ACT I, 852 F.2d at 1340; Pacifica Foundation, 56 FCC 2d at 97, recon. denied, 59 FCC 2d 892 (1976), rev'd, Pacifica Foundation v. F.C.C., 556 F.2d 9 (D.C. Cir. 1977); rev'd, Pacifica, 438 U.S. 726. In both Pacifica and Sable the Supreme Court recognized the government's interest in assisting parental supervision of their children and, generally, in protecting the wellbeing of youth, citing Ginsberg v. New York, 390 U.S. 629, 639 (1968). Sable, 109 S. Ct. at 2836; Pacifica, 438 U.S. at 749-750. In the NOI, we solicited comment on whether a 24-hour prohibition of broadcast indecency advances this interest. We also noted that courts have recognized an alternative governmental interest in protecting the public's right to be free from indecent material in the privacy of their homes, and sought comment on this point.

15. Although parties generally agree that the government has an interest in protecting minors from indecent broadcasts, they differ on the scope of that interest. Some parties maintain that the government's sole legitimate interest is to facilitate parental supervision, and not to substitute governmental for parental supervision.16/ In contrast, Morality in Media (MIM) argues that a 24-hour prohibition on broadcast indecency advances an independent

16 Capital Cities/ABC (ABC) Comments at 28; Pacifica Foundation et al. (Pacifica) Comments at 32; P.E.N. American Center et al. (PEN) Comments at 9; Cohn and Marks (C&M) Comments at 20; and Comments submitted Jointly by a number of broadcasters and organizations, including the National Association of Broadcasters, CBS Inc., Action for Children's Television, and the American Civil Liberties Union et al. (hereinafter collectively referred to as "Broadcasters") at 19, 23.

governmental interest in the well-being of minors,17/ and that the Pacifica decision can be read to establish an "indecent for all (including adults) standard, and not merely an "indecent for children" standard. 18/ On the other hand, Broadcasters argue that there is no legitimate interest in protecting adults from indecency, as adults have a right to receive constitutionally protected indecent material.19/ Several commenters argue that a 24-hour prohibition also advances a governmental interest in protecting the public's right to be free from indecent material in the privacy of their homes.20/ Cohn and Marks (C&M) disagrees, arguing that adults, unlike children, are capable of receiving the "first blow" from constitutionally protected indecent speech without undue damage.21/

16. It is well established that protecting children from exposure to indecent material is a compelling governmental interest. See e.g., Sable, 109 S. Ct. at 2836; New York v. Ferber, 458 U.S. 747, 756-57 (1982); Ginsberg v. New York, 390 U.S. 629, 639-40 (1968); Carlin Communications, Inc. v. FCC, 749 F.2d 113, 121 (2d Cir. 1984). Two related rationales underlie this interest. First, as the Court explained in Ginsberg and reiterated in Pacifica, see 438 U.S. at 749-

17 MIM Reply Comments at 15-16.

18 MIM Comments at 4-5.

19 Broadcasters Comments at 5-6.

20 MIM Comments at 12-14; AFA Comments at 2-7; Salem Reply Comments at 49-53.

21 C&M Comments at 19 n.28. C&M's reference to absorbing the "first blow" derives from Pacifica, 438 U.S. at 749: "To say that one may avoid 750, "parents' claim to authority in their own household to

(Footenote Continuted)

direct the rearing of their children is basic in the structure of our society," and parents are "entitled to the support of laws designed to aid discharge of that responsibility." 390 U.S. at 639. Thus, the regulation of broadcast indecency is intended "to facilitate parental supervision of children's listening." ACT I, 852 F.2d at 1343. In addition, the Supreme Court has expressly stated that "a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'" New York v. Ferber, 458 U.S. at 756-57, quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982). As stated by the Court in Ginsberg, "[t]he State also has an independent interest in the well-being of its youth." 390 U.S. at 640. The Court quoted with approval from People v. Kahan, 15 N.Y.2d 311, 312, 206 N.E.2d 333, 334 (C.A.N.Y. 1965) (Fuld, J., concurring), which dealt with the sale of sexually explicit material to children:

> While the supervision of children's reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them. It is, therefore, altogether fitting and proper for a state to include in a statute designed to regulate the sale of pornography to children special standards, broader than those embodied in legislation aimed at controlling dissemination

(Footenote Continued)
further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow." See also n.29 infra

of such material to adults.

390 U.S. at 640. See also Prince v. Massachusetts, 321 U.S. 158, 165 (1944) (state interest in protecting "the welfare of children" and preventing abuses that might prevent their "growth into free and independent well-developed men and citizens").22/ These two related purposes, supporting parental supervision and promoting the well-being of youth, support the enforcement of narrowly drawn measures to restrict children's access to indecent materials.

17. Despite the fact that protecting children from exposure to indecent material is recognized as a compelling governmental interest, some parties, including P.E.N. American Center et al. (PEN) and Broadcasters, argue that there is no proof that exposure to indecent broadcasts harms children. Broadcasters submit a study that concludes that few studies have been performed regarding harm resulting from indecency and that there is little evidence of harm to

22 There seems to have been some understandable confusion in the past as to the extent to which we relied on both of these two purposes -- supporting parental supervision and promoting the well-being of youth -- in serving the compelling interest of protecting children. Compare, e.g., Reconsideration Order, 3 FCC Rcd at 930 ¶3, with 3 FCC Rcd 931 ¶11. The court in ACT I understood the Commission's position as based solely on its interest in supporting parental authority. ACT I, 852 F.2d at 1343. However, the Supreme Court in various cases, including Ginsberg, Pacifica, and Sable, has recognized a broader governmental interest in protecting children which goes beyond merely supporting parental supervision, and Congress specifically referenced this broader interest in directing the adoption of the 24-hour prohibition on broadcast indecency. See 134 Cong. Rec. S9912 (daily ed. July 26, 1988) (statement of Sen. Helms). We take this occasion to state that, consistent with Congress' direction, the broader view more accurately reflects what we seek to accomplish -- specifically, to support parental supervision and to promote generally the well-being of youth.

children.23/ On the other hand, Salem Communications Corporation (Salem) and American Family Association et al. (AFA) submit studies to support their argument that exposure to indecent broadcasting has the potential to harm children. For example, AFA submitted findings from a clinical psychologist who concludes that children are harmed by pornography.24/

18. The debate over harm to children is not at issue here. Irrespective of the continuing social science debate, the courts have recognized Congress' authority, derived from the governmental interest in protecting its youth, to regulate access by children to indecent material. As a legal matter, it is well established that exposure of children to such material may be harmful, even if that effect has not been completely proven scientifically. See Pacifica, 438 U.S. at 757-58 (Powell, J., concurring); Ginsberg, 390 U.S. at 641-43. In proscribing the diss~emination of indecent material to minors, Congress has considered testimony that cites its harmful effects and has responded not only with the statute and mandate before us in this particular case, but also with the passage of other statutes that limit the availability of indecent material to minors.25/ For example, Congress has

23 Broadcasters Comments at Appendix A.

24 AFA Reply Comments at Appendix 2. In defining pornography, Victor B. Cline, author of the study, noted that "something could be regarded as 'pornographic' but still not be legally obscene." Id. at 1.

25 See Telephone Decency Act of 1987, Hearing Before the Subcommittee on Telecommunications and Finance of the U.S. House of Representatives Committee on Energy and Commerce, 100th Cong., 1st Sess. (Serial No. 100-99, Sept. 30, 1987) at pp. 22-26, 27, 63-64, 96-97; Cable-Porn and Dial-A-Porn Control Act, Hearing Before the

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acted to protect minors from indecent telephone messages,26/ and the Supreme Court in Sable fully recognized Congress' authority to do so (although it held that Congress in that case had not sufficiently tailored its effot to serve this interest). See 109 S.Ct. at 2839. Similarly, in 1984, Congress required cable operators to make available to their customers a device to enable them to control reception of indecnt programming to protect minors from inadvertant access. See 47 U.S.C. §544(d)(2)(A). More broadly, the Supreme Court has upheld, in the face of a First Amendment challenge, a congressional statute which protects the public, and particularly children, from unwanted mail which the recipient considers offensively lewd. See 39 U.S.C. §§3008 and 3010 (1988); Rowan v. Post Office Department, 397 U.S. 728 (1970). These statutes evidence findings by Congress that children deserve protection from harm that indecent material may inflict. It is significant that the 24-hour prohibition specifically mandated by the Congress, and although Congress is not the ultimate interpreter of the Constitution, its findings and purposes are due deference as those of co-equal branch of government charged with providing for the general welfare of the United States. See Metro Broadcasting v. F.C.C., No. 89-453, 58 U.S.L.W. 5053, 5061 (U.S. June 27, 1990).

19. Our concern with the harm to children caused by exposure to indecent broadcast material is particularly strong

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Subcommittee on Criminal Law of the United States Senate Committee on the Judiciary, 99th Cong., 1st Sess. (July 31, 1985, Serial No. J-99-46) at pp. 103, 135-38.

26 See Pub. L. 98-214, 97 Stat. 1469 (1983); amended by Pub. L. 100-297, 102 Stat. 424 (1988); further amended by Pub. L. 101-166, 103 Stat. 1159, 1192-1194 (1989).

given the range of materials that could be included in the "indecent" programming category (and thus conceivably could be broadcast between 8 p.m. and 6 a.m., given the current restrictions on our enforcement authority). As Justice Scalia noted in his Sable concurrence, "the more narrow the understanding of what is 'obscene,' and hence the more pornographic what is embraced within the residual category of 'indecency,' the more reasonable it becomes to insist upon greater assurance of insulation from minors." Sable, 109 S. 2839 (Scalia, J., concurring).

20. It thus is significant that the courts have applied a very narrow definition of obscenity in ruling on pornographic films, holding that movies containing graphic depictions of sex acts, such as "Deep Throat" and "Debbie Does Dallas," are not legally obscene.27/ We recognize that these cases have not involved the broadcast media and that most broadcasters are likely to exercise restraint and not air such movies unedited. Our own enforcement actions demonstrate, however, that some broadcasters have been willing to air patently offensive, sexually explicit material that would seem to tread close to the obscenity line.28/

21. The broad range of sexually-oriented material that has been or could be considered indecent or "protected speech" -- but not obscene speech -- accordingly heightens our concerns for preventing harm to children. Specifically, we find that Justice Scalia's statement in Sable is extremely relevant in the broadcast indecency context. It has become "more reasonable . . . . to insist upon greater assurance of insulation from minors" in light of the extremely

28 Examples of the patently offensive indecent material broadcast by some stations are included in Appendix B.

pornographic nature of what may be encompassed within the category of broadcast indecency.

22. Although the Commission has focused on the government's interest in protecting children as a basis for regulating broadcast indecency, preserving the privacy of the home provides an alternative basis for upholding the constitutionality of the 24-hour prohibition. In Pacifica, the SupremeCourt's first stated rationale for sustaining the Commission's decision was the right of all members of the public to be free of indecent material in the privacy of their homes. The Court Pound that "the broadcast media haveestablished a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." 438 U.S. 726, 748, citing Rowan v. Post Office Dept., 397 U.S. 728 (1970); Id. at 759-60 (Powell, J., concurring in Sable, the Supreme Court again referred to this residential privacy interest, noting the "unique" attributes of broadcasting, i.e., that it "can intrude on the privacy of the home without prior warning as to program content." 109 S. Ct. at 2837.30/

29 In his concurrence, Justice Powell noted that "broadcasting — unlike most other forms of communication — comes directly into the home, the one place where people ordinarily have~the right not to-be assaulted by uninvited and offensive sights and sounds. . . . Although the First Amendment may require unwilling adults to absorb the first blow of offensive but protected speech when they are in public before they turn away, . . . a different order of values obtains in the home." 438 U.S. at 759 (Powell, J., concurring in part) (citation omitted).

30 The Court has recognized the government's substantial interest in protecting the privacy of the home in non-broadcast contexts as well. See,

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23. The government's interest in preserving the privacy of the home reinforces its interest in protecting children. As D.C. Circuit Judge Leventhal noted in his dissenting opinion in Pacifica, "[w]ith the pervasiveness of TV-radio and its reach into the home the choice made by broadcasters precludes an effective choice by the family. Because of the unique interest in home life, especia~lly strong in homes where children are being raised, it is bootless to quote from cases that reflect a more permissive attitude to speech in public streets and places, without attention to the difference. . . . The reality of broadcasting's special access to the home con~joins with the passivity of TV-radio reception — a mere click, without current purchase." 556 F.2d at 33 (Leventhal, J., dissenting). While the record demonstrates that a 24-hour prohibition on broadcast indecency is needed to advance our primary interest in controlling children's access to indecent materials, it also supports this alternative residential privacy interest, particularly the evidence concerning the pervasiveness of the broadcast media, the prevalence of random tuning and remote control devices, and the ineffectiveness of prior warnings. See infra at pp. 17-18 and 34-35.

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e.g., Frisby v. Schultz, 487 U.S. 474, 484 (1988) (upholding a narrowly-tailored ban on picketing a specific residence and stating that "we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom"); Carey v. Brown, 447 U.S. 455, 471 (1980) ("The State's interest in protecting the well-being, tranquility and privacy of the home is certainly of the highest order in a free and civilized society"); Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 77-78 (1983) (Rehnquist, J., con~curring) ("We have often recognized that individuals have a legitimate 'right to be left alone' in the privacy of the home . . . the one place where people ordinarily have the right not to be assaulted by uninvited and offensive sights and sounds").

C. Operative Definitions

1. Definition of Indecency

24. In carrying out its statutory responsibility to enforce Section 1464, the Commission consistently has defined indecency as "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." Pacifica Foundation, 56 FCC 2d at 98, 100 (1975), aff'd, F.C.C. v Pacifica Foundation, 438 U.S. 726 (1978); Reconsideration Order, 3 FCC Rcd at 930 ¶2 (1987), rev'd on other grounds, ACT I, 852 F.2d at 1338-39.31/ We continue to believe that this definition is sufficiently narrow to continue to pass muster under the First Amendment. Indeed, we note that the U.S. Court of Appeals for the D.C. Circuit, relying upon the Supreme Court's opinion in Pacifica, explicitly affirmed this definition recently in ACT I, 852 F.2d at 1340.

25. Many commenters agree that the Commission's generic definition of indecency retains its validity because it is sufficiently narrow and has survived Supreme Court scrutiny.32/ Others, however, claim that the definition is unconstitutionally vague,33/ and that the vagueness could

31 Our initial definition of indecency included the language "when there is a reasonable risk that children may be in the audience." Pacifica, 56 FCC 2d at 98. Starting with our 1987 decisions, however, we have treated the nature of the material involved and the presence of children in the audience as separate issues because the question whether there is a reasonable risk of children in the audience is "more pertinent to . . . whether a broadcast is 'actionable' under 18 U.S.C. § 1464 than to whether it is indecent." Reconsideration Order, 3 FCC Rcd at 936 n.6. See supra, n.8.

32 See, e.g., MIM Reply Comments at 22-25; Salem Reply Comments at 10-21; and AFA Reply Comments at 3-7.

suppress broadcast material with serious literary, artistic, social, and cultural value, as well as discussions on a range of subjects.34/ Several parties argue that the Commission should adopt a rule that defers to the reasonable, good faith ~judgments of licensees.35/ Finally, Broadcasters argue that a licensee should have a right to a trial de novo whenever the Commission applies the definition to specific circumstances.36/

26. We do not believe that application of our definition of indecency will lead to unconstitutional censor.ship. We have emphasized that "subject matter alone does not render material indecent. Only when that matter is presented in a manner that is patently offens ive will it be considered indecent." Reconsideration Order, 3 FCC Rcd at 932 (emphasis in original).37/

27. Furthermore, we will continue to give weight to reasonable licensee judgments when deciding to impose sanctions in specific cases. We cannot, however, abrogate our statutory duty to enforce Section 1464 by deferring absolutely to broadcasters' judgments. See ACT I at 1340

33 See, e.g., Broadcasters Comments at 35-40; PEN Comments at 11-16; Post-Newsweek Stations (Post) Comments at 1-2; ABC Comments at 19-21; C&M Comments at 7-16; and Cox Comments at 9-15.

34 PEN Comments at 16-20; Pacifica Comments at 13-20; Post Comments at 2-5; and KDVS Comments at 11-14.

35 Broadcasters Comments at 40; ABC Comments at 36-41; and Arizona Board of Regents et al. (Joint Parties) Comments at 22-23.

36 Broadcasters Comments at 44.

37 We also note that the courts already have determined that our definition of indecency is not unconstitutionally vague. See ACT I at 1338-1339.

n.14. Finally, in response to the suggestion by Broadcasters that a trial de novo be available, we note that under the procedure we have utilized for indecency enforcement actions, issuance of notices of apparent liability, a trial de novo is in fact available to any station that challenges the Commission's determination by not paying its forfeiture. See 47 U.S.C. § 504.

2. Definition of Children

28. We find that for the purpose of enforcing Section 1464,38/ children ages 17 and under constitute the category of persons that should be defined as "children." This conclusion is supported by the legislative history of the statutory 24-hour prohibition against indecent broadcasts, Supreme Court decisions addressing the regulation of other sexually explicit indecent materials, and other statutes governing the availability of indecent materials to children.

29. In the NOI, we noted that our 1987 enforcement rulings indicated that children 17 and under should be protected from indecent broadcast, and sought comment on whether we should continue to so define children. Arguing generally that including all minors would be consistent with state laws protecting minors from other sexually explicit speech, some parties agree that "children" should include persons 17 years old and under.39/ However, opposing parties argue that even though states may protect

38 Section 1464 states that "Whoever utters any obscene, indecent, or profane language by means of radio-communication shall be fined not more than $10,000 or imprisoned not more than two years, or both." 18 U.S.C. § 1464.

39 See, e.g., AFA Comments at 13; Bonneville International Corporation (Bonneville) Comments at 5; and Salem Reply Comments at 21-24.

children from obscenity, they do not protect children from indecency,40/ and that in any event there is no evidence that exposure to indecent speech harms children.41/

30. Defining children to be protected from indecent broadcasts as those 17 years old and under is consistent with the legislative history of the statutory provision requiring the Commission to enforce Section 1464 twenty four hours a day. That history reveals that the statute's author intended to encompass children 12 to 17, as well as those under 12, within the class of persons to be protected by the 24-hour prohibition.42/ Since the statutory provision originated as an amendment introduced on the Senate floor, no committee reports exist for reference. The author's explanation, delivered immediately before the measure was adopted, therefore must be accorded substantial weight in interpreting the provision.43/

31. In addition, defining children as those 17 and

40 See Broadcasters Comments at 26-29. See also Cox Enterprises (Cox) Comments at 26-28 and PEN Comments at 20-23.

41 Broadcasters Comments at 13-17 and Appendix A; Broadcasters Reply Comments at 10-12; Pacifica Comments at at 30-31; and ABC Comments at 23-28.

42 In enacting the 24-hour prohibition, Senator Helms, the author of the legislation, relied upon data regarding children 12 to 17 in arguing for enactment of the prohibition and, therefore, intended for it to apply to this age category. 134 Cong. Rec. S9912 (daily ed. July 26, 1988) (statement of Sen. Helms).

43 See North Haven Board of Education v. Bell, 456 U.S. 512, 526-527 (1982); Steiner v. Mitchell, 350 U.S. 247, 254 (1956) (remarks of legislation's sponsor is an authoritative guide to statute's construction and deserves to be accorded substantial weight). See also National Woodwork Manufacturers Association v. NLRB, 386 U.S. 612, 640 (1967) ("It is the sponsors that we look to when the meaning of the statutory words is in doubt.")

under is consistent with other laws regulating the availability of sexually explicit indecent materials to children. One such statute is the "dial-a-porn" prohibition, 47 U.S.C.A. § 223(b)(3) (Supp. 1990), enacted in 1989, which prohibits indecent telephone communications to persons under the age of 18. This provision is strong evidence that Congress has found that persons 17 and under should be protected from indecent materials. In addition, contrary to the comments cited above, the NOI at Appendix A lists statutes from 48 states that penalize persons for disseminating to minors materials that are sexually explicit, and not necessarily obscene by adult standards. Most of these state laws protect children ages 17 and under.

32. The government's interest in protecting children 17 and under from exposure to indecent materials also has been recognized by the courts. For example, when discussing an earlier version of the "dial-a-porn" statute, the Supreme Court in Sable explicitly recognized the government's "compelling interest in preventing minors from being exposed to indecent telephone messages," and tacitly approved Congress' decision to apply the statute to children ages 17 and under. 109 S. Ct. at 2839. Similarly, in Ginsberg, 390 U.S. at 631, and Bethel School District No. 403 v. Fraser, 478 U.S. 675, the Supreme Court found a compelling governmental interest in controlling the availability of indecent matter to persons in the 12-17 age group. These precedents make clear that the government has a legitimate interest in protecting persons 17 and under from exposure to indecent broadcast materials.

33. We recognize that the court in ACT I criticized the Commission for not clearly defining "children" for purposes of applying Section 1464 and for failing to justify its application to the 12-17 age group.44/ In this report we

clarify that all children 17 and under will be included in the protected age group. We find sufficient justification for adopting this definition in analogous federal and state statutes, Supreme Court precedent, and in the legislative history of the 24-hour statutory prohibition against indecent broadcasts. Accordingly, for purposes of protecting children from exposure to indecent broadcast materials, we will consider "children" to be persons age 17 and under.

44 The Court in ACT I noted that the Commission in a 1976 legislative proposal had recommended that the regulation of broadcast indecency be directed to protecting children under 12. See 852 F.2d at 1342, citing 122 Cong. Rec. at 33,367 n.119. At the time, we made this recommendation for two reasons. First, we proposed that broadcasters could defend against an indecency complaint by showing that they had made efforts to minimize the risk of exposure to children. Including 18-year olds in the definition of children, we feared, would deprive broadcasters of this defense because of the difficulties inherent in effectively shielding 18-year olds from indecent programming. Second, we observed that age 12 "is the accepted upper limit for children's programming in the industry and at the Commission." 122 Cong. Rec. at 33,367 n.119; see 122 Cong. Rec. at 33,364 (Sept. 29, 1976).

However, now outside the confines of that debate and on further examination, we conclude that the appropriate "upper limit for children's programming" differs from the appropriate upper limit for protecting children from exposure to indecent material. To the extent the public interest requires broadcasters to offer age-specific or other special programming for children, that interest subsides when the child reaches an age, such as 12 years old, when general interest programming serves his or her needs. In contrast, the wide usage of the age of 17 and under in other federal and state laws intended to protect children from access to sexually explicit material demonstrates the general acceptance of the need to protect children older than 12 from exposure to such material. Moreover, our recommendation to Congress in 1976 simply struck a different balance between the need to protect children and the rights of adults to see or hear indecent matter from that struck by Congress in 1988 when it directed the Commission to enforce the prohibition on indecent broadcasting 24 hours a day.

D. Narrowly Tailored Means

1. Accessibility to Children

34. As did the Supreme Court in Pacifica, we find that the broadcast medium is uniquely pervasive and accessible to minors, and that these characteristics further justify prudent regulation of indecent broadcast programs. The Supreme Court has recognized that "each medium of expression presents special First Amendment problems." Pacifica, 438 U.S. at 748. Broadcasting has specific characteristics that support regulation of indecency that would not necessarily be permissible if applied to other media. In particular, for purposes of regulating indecent broadcasting, the Court has noted "that broadcasting is 'uniquely pervasive,' can intrude on the privacy of the home without prior warning as to program content, and is 'uniquely accessible to children, even those too young to read.'" Sable, 109 S. Ct. at 2837, quoting Pacifica, 438 U.S. at 748-49.45/

35. Notably, the Supreme Court in Sable distinguished indecent telephone services from broadcasting, observing that the caller to a "dial-a-porn" service must "take affirmative steps to receive the communication," 109 S. Ct. at 2837. In contrast, "[b]ecause the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content." Pacifica, 438 U.S. at 748. Thus, "[p]lacing a telephone call is not the same as turning on a radio and being taken by surprise by an indecent message." 109 S. Ct.

45 Similarly, in enacting the 24-hour prohibition on broadcast indecency, the statute's author expressed concern regarding the pervasiveness and accessibility of the broadcast medium. 134 Cong. Rec. S9912 (daily ed. July 26, 1988) (statement of Sen. Helms).

at 2837.

36. The Sable decision strongly suggests that a 24-hour broadcast indecency prohibition is constitutional if it is the most narrowly tailored means of protecting children from exposure to indecent materials. The reversal of the dial-a-porn prohibition in Sable rested not on the failure to channel such communication, but on the government's failure to show that a complete prohibition on indecent dial-a-porn was necessary to meet the government's interest in protecting children from the indecent material. The emphasis the Court placed on the inadequacy of the record in Sable thus supports a conclusion that a total prohibition on indecency would be upheld if the record demonstrates that no alternative would effectively serve the compelling interest at stake.

37. The record in this proceeding confirms the general pervasiveness and accessibility of broadcasts to children. TV, available in virtually every household, is viewed an average of 26 hours per week by children ages 2 to 17 years old.46/ Between 25% and almost 50% of children have a TV set for their personal use.47/ Radio is even more pervasive, with each household having an average of over five radios Over 99% of children age 12 to 17 listen to radio at least once a week.48/ Moreover, as described in detail infra, children do

46 NOI at 8361.

47 Id. Additional data submitted by AFA illustrates the pervasive nature of television, using the Chicago television market as an example. Chicago has 5 VHF and 3 UHF TV stations, of which most broadcast at least 20 hours a day, 7 days a week. As a result, for over 80% of all hours in a week, day or night, there are at least 8 different programs being broadcast simultaneously. In a typical 168 hour broadcast week, there are over 1,120 hours of programs broadcast. AFA Comments at 41-42.

48 Id.

not just have general access to the broadcast media, but they in fact tune in to their radio and television sets without meaningful supervision at all times of the day and night.

2. Children's Listening and Viewing Habits

38. The record indicates that there are children in the radio and television audience at all hours of the day and night. The data further shows that a significant number of these children are not subject to active parental supervision, even during the late evening and early morning hours.

a. Radio

39. The data submitted in response to the NOI indicate that there are children in the radio listening audience at all times of day, with an average of nearly three-quarters of a million children listening to radio between midnight and 6 a.m. From this data we conclude that there is no time during which indecent material could be broadcast on radio without a reasonable risk that significant numbers of children will be listening to it.

40. The Commission's initial review of radio ratings and surveys revealed little quantitative information about the radio listening habits of children under 12 years of age, although listening data for children ages 12-17 were available. These data indicated that, in all time frames measured, including midnight to 6 a.m., a higher percentage of all children ages 12-17 listened to radio than the percentage of all adults 18 and over listening to radio. Furthermore, post-midnight listening for children ages 12-17 averaged 2 3/4 hours per week.[49]

[49] Id. at 8361.

41. The NOI indicated that the national listening audience for children ages 12-17 between midnight and 6 a.m. peaked at 1,471,000 between 12:00 and 12:15 a.m., decreased gradually to a low of 309,000 between 3:45 and 4:00 a.m., and then increased to 1,429,000 between 5:45 and 6:00 a.m. The average quarter-hour audience for the entire six hour block of midnight to 6 a.m. was 716,000 children ages 12-17. The average one day cume (the estimated number of different persons who listen to radio for a minimum of five minutes within a specified time frame) for between midnight and 6 a.m. was 3,533,000 children ages 12-17. That is, during any given midnight to 6:00 a.m. time frame on any given day, 3,533,000 different children ages 12-17 in the United States listened to the radio for at least five minutes. The weekly cume for listening between midnight and 6 a.m. was 10,896,000 children ages 12-17. These listeners constituted 10 to 12 percent of the post-midnight total listening audience and this proportion was generally consistent for daytime listening as well.50/ We requested comment on these data and asked commenters to submit any other data or studies regarding listening habits of children and adults.

42. Commenters supporting the 24-hour prohibition submit that children ages 12-17 make up a substantial portion of the radio audience. MIM submits radio listening data for children ages 12-17 for New York, Chicago and Los Angeles collected by Arbitron for the summer of 1989.51/ MIM combines the data for the three markets and makes a national projection of post-midnight listening by children ages 12-17 that is remarkably close to the national data presented in the

50/ Id.

51/ MIM Comments at 42 n.2.

NOI.52/ MIM estimates that from 12 to 1:00 a.m. the average quarter hour audience for this age group nationally is 1,334,557, which is very close to the Commission's estimate of 1,429,000 for 12 to 12:15 a.m. MIM's estimated low in listening among children ages 12-17 occurs at 4-5 a.m. with 220,067 in the audience, whereas the Commission estimated 309,000 in the audience from 3:45 to 4:00 a.m.

43. Bonneville International Corporation (Bonneville) reviewed data on audiences for several of its radio stations that it classifies as having "some teen appeal," and found that children ages 12-17 are in the audience post-midnight. Bonneville also reviewed data for non-Bonneville stations in markets in which Bonneville has stations and, similarly, found stations with greater post-midnight listening by children ages 12-17 than any other demographic group.53/ Salem submits a Bakersfield, California, radio study showing that 28% of children ages 12-17 in that market listen to radio between midnight and 6 a.m.54/ National Religious Broadcasters (NRB) also submits radio data for Detroit and Tampa showing large numbers of 12 to 17 year olds listening to radio at all times of the day and night.55/

44. Broadcasters claim that the audience for certain programming that the Commission is reviewing as (or has deemed to be) indecent contains few children, referring to a Gallup survey of New York area households with children

52 NOI at 8361.

53 Bonneville Comments at 6-7. Bonneville's statistics are from Spring 1989 Arbitron Radio Ratings (Metro AQH M-F midnight - 1:00 a.m.).

54 Salem Reply Comments at Exhibit 1.

55 NRB Reply Comments at Exhibit 2.

ages 6-11 commissioned by Infinity Broadcasting indicating that in 99.6% of households surveyed, no children in that age group listen to the Howard Stern morning radio show.56/ In the sole household that reported a child listening to that show, it was reported that the child was supervised by an adult.57/ MIM responds that although Broadcasters assert that few children ages 6 to 11 listen to the Howard Stern show, there are older children in the audience. As reported in Arbitron's Summer 1989 "Radio Market Report" for New York, only 5 of the 48 stations listed for the New York market have a greater audience of children ages 12-17 than WXRK-FM Monday through Friday, 7-8 a.m., when a portion of the Howard Stern show is broadcast. MIM further states that Arbitron reports an estimated 10,600 children ages t2-17 listened to the Stern show for at least 5 minutes during any quarter hour from 7-8 a.m. Monday through Friday in the summer of 1989.58/

45. Other commenters opposing the 24-hour prohibition dispute the Commission's initial findings and submit radio listening data in support of their position. KDVS-FM (KDVS) urges that channeling be used to enhance parental responsibility, and states that Arbitron and other radio surveys suggest that the number of young children in the audience during school hours is only between 3 and 5% of the potential audience of children ages 12-17. This group comprises only 1-4% of the total audience during

56 Mr. Stern's morning radio show was the subject of one of the Commission's 1987 indecency decisions. See Infinity Broadcasting Corp. of Pennsylvania, 2 FCC Rcd 2705 (1987).

57 Broadcasters Comments at 26 n.65, citing a poll by the Gallup Organization, WXRK Radio, Special Listenership Study (Dec. 1989).

58 MIM Reply Comments at 20.

these broadcast hours. Both of these figures are far lower than even those seen in the 11 p.m.-midnight sampling, and approximate the post-midnight sampling. KDVS claims that these statistics suggest two appropriate times for channeling – during the school day and the late evening hours. KDVS also states that the same survey (Arbitron Fall 1983) reported that, during Monday through Friday, 7 p.m. to midnight, only 10% of the total audience of children ages 12-17 listened to radio outside the home at those hours. Therefore, argues KDVS, most of the children in the radio audience would be subject to adult supervision.59/

46. KDVS also states that children ages 12-17 make up only 10% of a very small midnight to 6 a.m. listening audience. KDVS maintains that nationally, only about 3.5% of children ages 12-17 are present in any quarter hour post-midnight time frame for all stations. KDVS estimates that if this age group comprises 10% of the population, then the 3.5% of all children ages 12-17 listening to radio post-midnight represents only 0.35% of the entire population.60/ Finally, KDVS states that the Commission, in the NOI, did not identify estimates of the sampling error or relative standard error involved in the ratings.61/

47. Pacifica Foundation et al. (Pacifica) also claims that listening statistics regarding children ages 12-17 are flawed in their application. Pacifica states that the Commission gives the impression that a significant number of children in this age group listen to radio generally.

59 KDVS Comments at 7-9.

60 KDVS Reply Comments at 3-4.

61 Id. at 5-6.

Pacifica, like KDVS, claims that the percentage of children ages 12-17 of the total listening population (the largest possible representation of these data) does not reflect the percentage of these children in the actual total population. Pacifica states that the 12-17-year old listening population should be divided by the total population to obtain a more realistic representation of this group's listening.

48. Pacifica further observes that such data do not reflect children's listening to public radio stations. Pacifica relies on data from Arbitron, Spring 1989, to conclude that children ages 12-17 listening to public radio stations account for a mere 0.2% share of this group's listening to radio and no [0] share of total radio listening. Only 1.5% of the population of children ages 12-17 tuned into public radio for 5 minutes during an average week from this survey.62/ Broadcasters also refer to the minimal audience of children ages 12-17 that National Public Radio (NPR) attracts. Broadcasters submit that, according to the Arbitron National Report (Spring' 1989), member stations carrying NPR programming have no measurable audience in this age group from 6 to 10 a.m. and 6 p.m. to 6 a.m.63/

49. The submitted data confirm our initial determination that there are a significant number of children in the listening audience at all times of day and night. MIM, Salem and NRB have submitted data illustrating that the listening patterns of children ages 12-17 are similar to those described in the NOI,64/ which indicated that the percentage of children in this age group listening to radio during all time

62 Pacifica Comments at 23-25 and Attachment 4.

63 Broadcasters Comments at 26.

64 NOI at 8361 and Appendix B, Tables 3 and 4.

frames was higher than the percentage of adults age 18 and over listening to radio.65/ These 12 to 17 year olds represent over 10% of the 6.9 million total average quarter-hour listening audience from midnight to 6 a.m.66/ Although KDVS maintains that there are few children ages 12-17 in the listening audience during the day, even low numbers of children (KDVS' submission indicates that 1-4% of the total audience is children ages 12-17) confirm that there are significant numbers of children listening to radio during school hours. Similarly, although KDVS maintains that 12 to 17 year olds listening between midnight and 6 a.m. during any quarter hour make up only 0.35% of the total population, this figure represents 3.5% of all children in this age group in the U.S., or 716,000 children ages 12-17.67/

b. Television

50. Our initial data, and data supplied by several commenters, validate the Commission's concerns regarding children's viewing, especially late night viewing, of television. These data demonstrate that there is a reasonable risk that a significant number of children are present in the nationwide television viewing audience at all times.

51. The NOI stated that, based on ratings data,

65 NOI Appendix B, Table 3.

66 With regard to KDVS' concern that the Commission omitted estimates of the sampling error or relative standard error in the data presented in the NOI, the Commission does not attach the rating companies' descriptions of methodology with error and reliability estimates for their data. However, these descriptions are readily available in ratings reports, and do not suggest that this information is systematically skewed.

67 NOI at Appendix B, Table 4.

children are in the television audience throughout the day. Unlike radio, there are no reported data reflecting television viewing by age between 2:00 and 6:00 a.m. That which is available, however, demonstrates that children, particularly those ages 12-17, remain in the viewing audience throughout the last reported time period ending at 2:00 a.m. The data also indicate that between 3% (for ages 2 to 5) and 8% (for ages 12-17) of children's weekly viewing occurs between 11:00 p.m. and 1:00 a.m. The NOI also analyzed Arbitron data depicting the percentage of persons by age group that watch TV from 6:00 p.m. to 1:45 a.m. in four selected markets. These data show that percentage-wise, as many children ages 12-17 as adults watch television during the late evening hours, and that a higher percentage of 12 to 17 year olds than adults may watch television during these hours in some markets during the summer months.68/ We requested comment on these data and solicited additional studies or data regarding children's viewing.

52. The United States Catholic Conference (USCC) submits results of a radio listening and television viewing survey of almost 8100 children attending Catholic diocesan schools (5,726 age 12 and under and 2,346 age 13-18). The USCC survey indicated that children 12 and under watch an average of 3.5 hours of television per day, mostly from 3-9 p.m. Monday through Friday, and an average of 6 hours per day on the weekend, mostly from 8-11 a.m. and 7-11 p.m. USCC also reported that children age 13-18 watch an average of 3.5 hours per day, mostly from 4-11 p.m. Monday through Friday, and an average of 6 hours per day on the weekend, mostly from 7-9 a.m. and 2-11 p.m.69/ USCC concludes that

68 NOI at 8362 and Appendix C.

69 USCC Comments at 5. We note that USCC admits that the results of its survey are not conclusive, and that it was unable to receive a full responseto its survey. Id. at 5-6.

if a reasonably clear distinction between times when children are and are not in the audience can be discerned, then time of day restrictions for the broadcast of indecent material could be established.

53. KDVS takes issue with the Commission's graphic representation of Arbitron television viewing data for the four markets that appear in Appendix C of the NOI. It asserts that the post-10:30 p.m. periods are measured in fifteen-minute intervals, whereas pre-10:30 p.m. time periods are measured in thirty-minute intervals, thus depicting the rate of audience decline after 10:30 p.m. as slower than it is in reality. KDVS further states that the Commission has implied incorrectly that the proportion of age groups represented on the charts is indicative that each group is similar in size.70/

54. Several commenters have filed evidence indicating that children comprise a significant portion of the late night audience. Salem and NRB submit data showing that, in five metropolitan areas, the number of children in the viewing audience late at night is substantial.71/ For example, in the Washington, D.C. market, for July 1989, seven percent of children ages 12-17 and four percent of children ages 2-11 are in the viewing audience from 1:45 to 2:00 a.m., Monday through Friday. Salem averages the data for the five markets and projects the national television audience for various post 11:00 p.m. time frames. For the 1:45-2:00 a.m. period, Salem projects that, nationally, 4.8% of children ages 12-17 watch television. This translates to over 970,000 12 to 17 year olds

70 KVDS Reply Comments at 4.

71 Salem Reply Comment at Exhibit 2 and NRB Reply Comments at Exhibit 1, citing data from Arbitron Television Market Report for the five markets for July 1989.

in the television audience at that hour.72/

55. These data and our initial data confirm our belief that there is a reasonable risk that significant numbers of children are watching television at all times, including late at night. USCC's suggestion that distinctions can be made as to when children are or are not in the viewing audience is unpersuasive. Its survey indicates only that children watch TV mostly in certain time frames, but these time frames are not all-inclusive of children's viewing. In addition, we note that 66.9% of U.S. television households have videotape recorders (VCRs).73/ Through VCRs, children can record late night programming for viewing during daytime, thus obtaining access to programs even if they are not in the audience when the programs are initially aired.

56. KDVS' arguments regarding the data presented in the NOI also are unpersuasive. Depicting audience in 15 minute intervals as opposed to 30 minute intervals from 10:30 p.m. to 1:45 a.m. achieves a greater level of accuracy in the measurement of late night TV audiences. Using 30 minute increments does not alter the percentage of each age group that is watching TV at those times. We agree with KVDS that the rate of decline for all audience segments is relatively steep late at night. This does not change the evidence indicating that children remain in the viewing audience late at night. With regard to KDVS' contention that the Commission implied that each age group in the four markets charted in Appendix C of the NOI is similar in size, such an implication was not made. The NOI states that the

72 Salem multiplies the 20,254,000 total population of 12 to 17 year olds cited in the NOI by 4.8 to arrive at 972,192 children in this age range. Salem Reply Comments at 65.

73 1990 Nielsen Report on Television at 1.

percentage of each demographic group is represented on the chart. While the percentages of each group are, in some cases, equal, the actual numbers of each group are not. Nevertheless, there appears to be a reasonable risk that significant numbers of children are in the television viewing audience at all times.

c. Supervision

57. As previously noted, the government has a clearly established compelling interest in protecting children from exposure to indecent broadcast materials, both to facilitate parental supervision of their children and to generally promote the well-being of youth. In order to complie a record with respect to supporting parental supervision, the NOI requested comment on parents' ability to supervise children's listening and viewing, whether parents in fact supervise listening and viewing, and whether parents are concerned about their children's exposure to indecent broadcasts. Our preliminary finding was that there is significant unsupervised television viewing by children on a daily basis. In addition, while there are fewer data available to measure unsupervised radio listening among children, we preliminarily concluded that, because of the number of radios per household, a significant number of children have the opportunity for and actually engage in, unsupervised listening.74/ Our review of the record in this proceeding confirms the validity of these preliminary findings, and demonstrates that unsupervised children are watching and listening to television and radio at all times of day and night.

58. Broadcasters dispute the NOI's assumption that in order to supervise their children, parents must co-view or co-

74 NOI at 8363

listen with them or have specific knowledge of their viewing or listening. Broadcasters argue that as long as parents or other adults are present, they have the opportunity to supervise their children's viewing and listening. Broadcasters maintain that examining the presence of adults as the key to whether children are subject to adult supervision is analogous to the methods used by courts to examine the regulation of indecent material by cable and telephone. Rather than examining the actual use of technical devices to block reception of indecent material transmitted by cable or telephone, or examining parental supervision, Broadcasters state that courts instead analyze the opportunity to use these methods to block reception.

59. Broadcasters commissioned a survey of 1,000 homes with children 17 and under to determine opportunities for parental and adult supervision. According to the survey, over 88% of children were under parental supervision and 98% were under adult supervision between the hours of 8:00 p.m. and 6:00 a.m. During the 10:00 p.m. to 6:00 a.m. period, over 93% of children were under parental supervision and 99% were under adult supervision. Between midnight and 6:00 a.m., over 98% of children were under parental supervision and 99% were under adult supervision.75/ Broadcasters claim these data demonstrate that parents or other adults have the opportunity to supervise their children's viewing and listening during these hours.

60. MIM disputes Broadcasters' study, arguing that under the "opportunity for supervision" theory advanced by Broadcasters, the study equates presence with supervision, assumes that a child will not watch television or listen to the radio after his or her bedtime, and assumes that supervision

75/ Id. at 32-34, Appendix C

by anyone over the age of 18 is the equivalent of parental supervision.76/ AFA argues that even if a child is in the presence of an adult, that adult may not supervise a child as a parent would.77/ Even when parents are home, AFA argues, there is limited parent-child co-viewing of television. AFA submits the results of a 1989 study of co-viewing habits of parents and children that concludes that parents generally do not view family series with their children. The study found that, on average, parents and second graders co-viewed 5.6 prime time and 1.96 syndicated series in the last year. Parents and sixth graders co-viewed 7.21 prime time and 2.05 syndicated series, while parents and tenth graders co-viewed 7.63 prime time and 2.8 syndicated series. The study determined that for all series and for prime time series only, the mean co-viewing frequency was between something less than "just a few times this year" and "have watched [together], but not in the last year."78/ The authors of this study claim that "parents co-view with children, particularly when their viewing preferences coincide, and that co-viewing is associated with generally positive parental attitudes toward television and specific beliefs in encouragement for children learning from television. [The data] do not, however, suggest that co-viewing is very much motivated by an active determination to mediate children's television experiences."79/ On the other hand, USCC submits a survey of over 8,000 parochial school students showing that 81% of the respondents ages 12 and under, and 70% between the ages of 13 and 18, watch television with an adult at night.

76 MIM Reply Comments at 18-19.

77 AFA Reply Comments at 8.

78 AFA Comments at 38-39.

79 Id. at n.55.

The study also shows that 72% of the respondents ages 12 and under, and 90% between the ages of 13 and 18, sometimes or almost never listen to radio with an adult.80/

61. The record before us demonstrates that the pervasiveness and accessibility of television and radio, coupled with the lack of effective parental control mechanisms, discussed infra, make effective parental supervision exceedingly difficult if not impossible for the average parent. We noted in the NOI that 63% of television households have more than one television set, and of the ninety-nine percent of households with radios, each household has, on average, over five.81/ The number of televisions and radios in households can easily prevent a parent from actively supervising a child's viewing and listening habits. In a household with more than one television, a child may watch a program without parental knowledge. VCRs permit a child to tape a television program for later viewing without parental knowledge. The ability to listen to radio without parental knowledge is even greater, given the number of radios in the average household, their portability, and the widespread use of headphones.

62. We note, moreover, that parents' control of children's television viewing and radio listening differs from parental control of cable viewing and telephone calls. Technical means are readily available to block children's access to indecent cable programs and indecent telephone calls. Upon request, cable operators must provide a device such as a "lock-box" or "parental key" that permits a

80 USCC Comments at 5-6.

81 NOI at 8361.

subscriber to restrict access to selected programming,82/ and access codes and scrambling are among the methods which can restrict children's access to dial-a-porn services.83/ In both instances, these methods can restrict access by children whether or not parents are physically present and actively supervise. In the case of television and radio, however, there is no comparable means that is readily available upon which parents may rely to prevent children from watching indecent off-the-air broadcast television programs or listening to indecent radio programs. Most television receivers do not permit blocking of specific channels,84/ and channel blocking devices are not available for radios. There is no evidence in the record that a lock-box type of device is

82 Cable Communications Policy Act of 1984 § 624(d)(2), 47 U.S.C. § 544(d)(2).

83 See 47 U.S.C.A. § 223 as amended by Pub. L. 101-66, 103 Stat. 1159, 1192-1194 (1989); Regulations Concerning Indecent Communications by Telephone (Report and Order), FCC No. 90-230, adopted June 14, 1990.

84 In reply comments, Broadcasters submit a list compiled by the Consumers Union of selected television models currently sold in the United States. Broadcasters claim that over 120 models are equipped with a channel blocking feature that prevents unauthorized access to channels. Broadcasters Reply Comments n.14, Appendix 5. Virtually all of the televisions on this list have at least a twenty-inch screen and, Judging by the list price, appear to be color televisions. Broadcasters provide no data showing the market share held by these models. No commenters submitted evidence as to whether channel blocking devices for attachment to existing television sets are available. Furthermore, Broadcasters offer no information as to how channel blocking works, particularly whether a channel blocking feature completely prevents access to a particular channel or whether it may easily be circumvented. Moreover, most television sets used in homes today do not have any blocking mechanism. Finally, no party has submitted evidence regarding the feasibility of using televisions with channel blocking in this context, or of the market penetration of these televisions.

available for attachment to televisions and radios to prevent access to specific channels. Therefore, because parents cannot rely on technical devices to prevent children from viewing indecent programs, parents can effectively supervise their children only by co-viewing or co-listening, or, at a minimum, by remaining actively aware of what their children are watching at all times. As many concerned parents filing comments in this proceeding emphasized, however, it is not practical for parents to exercise this type of control. The letter of Elizabeth Urquhart of Houston, Texas, addressed to Commissioner Duggan, succinctly sums up the point made in a large number of other letters submitted in this proceeding in stating that "[I]t is not a matter of my responsibility to monitor. A person (parent) would have to be super human to monitor every program a child might watch in and out of our home [sic]."85/

63. We do not believe that Broadcasters' study

85 Many letters submitted in this proceeding emphasized the impossibility of close supervision. Representative of these are the following five. Mrs. Barbara Gious of Warsaw,. Indiana, wrote: "I have two teenage boys who have their own walkmans and tape recorders. There is no way that I can know what they are listening to all the time." Donald and Sandra Lee of Irving, Texas stated: "As working parents, our children have access to television at times when neither my husband nor myself are available to screen their viewing. The radio is available everywhere they go and it is equally offensive. . . ." Yvonne Thomas of Boonsboro, Maryland, a public school teacher, wrote "Many children live alone with a television as both parents are working." Another teacher, Ann Davis of Shrewsbury, Pennsylvania, wrote: "I tuned in the radio about 6 A.M. to see if any of the schools had been delayed [due to inclement weather]. This was the station suggested at school to listen to. I heard the most foul language and sexual innuendos I'd ever heard in public. . . . I had to ask [my son] to leave the room saying that I would let him know when the announcement was made." Cheryl Mayer of Bronson, Michigan, reported: "As I was driving my four children to school one morning, around 7:30, I was appalled at what I heard on a radio station. . . . two D.J.'s were being very crude."

demonstrates that parental presence alone can adequately protect children from indecent broadcast programming. Broadcasters' data show that at no time during the day are all children under parental supervision. Even during the period of time from 1:00 a.m. to 6:00 a.m., the survey found that 1.2% of the children were neither with a parent nor asleep.86/ Since children are in the broadcast audience during this period, it is not unlikely that some of these children could watch indecent programming broadcast late at night. In addition, although the survey asked parents if the child in question was "in the presence of at least one parent, stepparent, or legal guardian," the term "presence" was apparently undefined. A respondent may have answered that the child was in the "presence" of a parent even if the child was awake in another part of the home and the parent asleep. Nor did the survey ask what parents were doing during the hours that they were in the presence of children. Because there is no technical means to prevent children from viewing or listening to particular programs, supervision requires parents either to co-view or co-listen, or to remain actively aware of a child's viewing or listening at all times. As a practical matter, mere "presence" in the same house as a child does not necessarily translate into supervision.

64. Commenters have not disputed our estimates of the amount of unsupervised television viewing by children. Our analysis, based on a 1980 study of 817 American households with children between the ages of 6 and 17, estimated that the maximum amount of unsupervised children's daily viewing ranges from 212 to 222 minutes and the minimum ranges from 40 to 54 minutes.87/ We also

86 Broadcasters Comments, Appendix C, Table 2.

87 NOI at 8363 and Appendix B, Table 5 at 8376.

estimated that among children in certain age groups the maximum amount of unsupervised children's daily viewing could range from 357 to 375 minutes, if we assume that all of a child's viewing in two-television households occurs on a separate set from the parents'.88/ The NOI also suggested that the number of radios in households made a substantial amount of unsupervised radio listening by children likely. The data submitted by the parties to this proceeding do not refute these estimates. In any event, the record-demonstrates that parents cannot always provide meaningful supervision, even when they are present at home. Accordingly, we conclude that there is a substantial amount of unsupervised viewing and listening by children, and that as a practical matter, the pervasiveness and technology of broadcasting serve to deny parents the means necessary to exercise effective control over these activities.

d. Conclusions

65. The above evidence indicates that there is a reasonable risk that significant numbers of children are in the audience for radio and television broadcasts at all times of the day and night. The number of children present, moreover, clearly is more than "a few of the most enterprising and disobedient young people." Sable, 109 S. Ct. at 2838. For example, evidence submitted by the commenters indicates that, in all time frames measured, a higher percentage of all children between the ages of 12 and 17 listen to radio than the percentage of all adults age 18 and over, even between midnight and 6 a.m.89/ Although some commenters claim that 12 to 17 year olds listening between midnight and 6 a.m.

88 Id.

89 MIM Comments at 42-62, Salem Reply Comments at Exhibit 1, NRB Reply Comments at Exhibit 2; see also NOI at 8361 and Appendix B Tables 3 and 4.

during any quarter hour make up only 0.35% of the total population,90/ this figure represents a full 716,000 children between the ages of 12 and 17.91/

66. Similarly, the record demonstrates that there is a reasonable risk that a significant number of children are in the television audience throughout the broadcast day and night. As previously noted, available data show that children, particularly those between the ages of 12 and 17, are in the viewing audience until the last time period reported for television ratings. The data further show that as high a percentage of children ages 12 to 17 as adults watch television during the late evening hours. Indeed, for the 1:45 to 2:00 a.m. time period, one commenter has estimated that there are over 970,000 12 to 17 year olds in the television audience.92/ These figures, of course, do not take into consideration the number of children who may be using VCRs between midnight to 6 a.m. to record television programs for viewing at a later time.

67. The data further show that a significant number of children in the broadcast audience are not subject to active parental supervision, even during the late evening and early morning hours. Although Broadcasters have submitted a study alleging that many children are under "parental supervision" at all times of the broadcast day, the study does not establish that parents in fact actively supervise their

89 MIM Comments at 42-62; Salem Reply Comments at Exhibit 1; NRB Reply Comments at Exhibit 2; see also NOI at 8361 and Appendix B, Tables 3 and 4.

90 KDVS Reply Comments at 3-4.

91 NOI at Appendix B, Table 4.

92 Salem Reply Comments at 65.

children's viewing and listening of radio and television; rather, it shows only that most children are usually in the "presence" of an adult, an undefined term that leaves open the possibility that children may be watching or listening to a television or radio while their parents (or other adults) are in other parts of the house or are asleep. The record, moreover, indicates that children engage in unsupervised viewing and listening throughout the day and night not because of a lack of concern by parents, but because of the impracticality of total supervision that derives from a combination of the technology involved and the lack of available and effective parental control devices.

68. In sum, the evidence establishes that, given the pervasiveness and accessibility of radio and television, unsupervised children in pursuit of entertainment need be neither "enterprising" nor "disobedient" to turn on a television or radio, or to record a program on a VCR, at any time of day or night. Accordingly, we conclude that there exists a reasonable risk that a sufficient number of children are in the broadcast audience at all times to warrant narrowly-tailored government regulation of indecent broadcasting aimed both at facilitating parental supervision and promoting the well-being of youth. Such regulation is particularly necessary since, as previously discussed, a wide range of sexually explicit and patently offensive material may be encompassed within the definition of "indecency."[93]

E. Alternatives to 24-Hour Prohibition

69. The NOI solicited comment on alternatives to a 24-hour prohibition, including (1) channeling indecent broadcasts to a time of day when children most likely will not

93 See ¶¶ 19-21, supra.

be exposed to them; (2) using program rating codes or pre-broadcast warnings to protect children; and (3) relying upon broadcast technologies to limit children's access. After careful consideration of the record, we conclude that none of these options can effectively advance our interest in protecting children from indecency and, accordingly, that a 24-hour prohibition is the most narrowly tailored means of serving this compelling government interest.

1. Time Channeling

70. Time channeling would establish a specific time period during which non-obscene, but indecent adult-oriented programming could be aired. The feasibility of this alternative depends on whether indecent broadcasts could be channeled to hours when it is unlikely that children would be in the audience. We conclude that, based on the data indicating that there is a reasonable risk that children are present in the viewing and listening audience at all times, there is no time when the reasonable risk of children in the audience is sufficiently low to make their exposure to indecent programs unlikely. Accordingly, we conclude that it would not be possible for broadcast stations, as a general matter, to channel indecent material to certain times of the broadcast day without risk that a significant number of children will be watching or listening without meaningful parental supervision.

71. Broadcasters argue that channeling broadcasts to times of day when parents have an opportunity to supervise their children gives parents a meaningful opportunity to prevent children's access to indecent programs.94/ A 24-hour prohibition, argue Broadcasters, places government in the

94 Broadcasters Comments at 21.

position of deciding what children should see and hear.95/ KDVS suggests that the Commission implement time channeling during school days, when there is a reduced risk that children would be in the broadcast audience.96/ Other parties, however, note that a number of children are alone during various times of the day.97/ In this regard, we note that ACT I affirmed the Commission's regulation of a daytime indecent broadcast.98/

72. Finally, AFA argues that the effectiveness of a time channeling approach is diminished by the proliferation of VCRs, claiming that an estimated seventy-five to eighty percent of households with children have VCRs.99/ KDVS counters AFA's claim, arguing that most VCRs are purchased by parents, frequently for the personal use of their children, and that parents therefore must be aware of the possibility that their children may use VCRs to tape broadcast programming.100/

73. After further consideration of time channeling, we

95 Id. at 23.

96 KDVS Comments at 7-8. KDVS submits data from a 1983 Arbitron survey of the San Francisco metropolitan area showing that teens comprise one to four percent of the total television broadcast audience during the day.

97 AFA Comments at 36-37; Lynda Beams (Beams) Reply Comments at 8-9 and Exhibit G; Bonneville Comments at 8.

98 ACT I, 852 F.2d at 1341.

99 AFA Comments at 29. See also Salem Reply Comments at 63, note 92, in which Salem cites a 1990 Nielsen study showing that over 14% of VCR taping is done from 11:00 p.m. to 6:00 a.m., and over 50% of VCR recordings are made when the television is turned off.

100 KDVS Reply Comments at 6.

conclude that we cannot identify a time when the reasonable risk of children in the audience is sufficiently low to make their unsupervised viewing of indecent programs unlikely.101/ We have determined that at all times there is a reasonable risk that significant numbers of children are in the broadcast audience for television and radio. The proliferation of VCRs further undermines a channeling approach for television, for, as AFA noted, a majority of households with children have VCRs that children may operate to tape a program. Clearly, many teens and even younger children know how to use the recording and playback functions of a VCR. As a result, delayed viewing on a VCR provides children with access to programs broadcast at a time when their live viewing is least likely.

74. Broadcasters' argument that stations should be permitted to channel indecent programming to times of day when parents have an opportunity to supervise their children, moreover, fails to address the impracticality of parents supervising their children's listening and viewing 24 hours a day.102/ The record in this case includes thousands of letters from parents addressing this issue and convinces us that parents who wish to exercise such supervision do not have the tools or time available to do so because of the pervasiveness of the broadcast media and the lack of effective parental control devices.103/ Although

101 For this reason, we overrule the conclusion reached in the Reconsideration Order, 3 FCC Rcd 930 (1987), that time channeling is an effective means of controlling children's access to indecent broadcasting.

102 Indeed, it appears that the most effective means for parents to actively supervise their children's listening and viewing activities is to remove all televisions and radios. This result not only is highly impractical, but also would deprive families of the many benefits of the broadcast media.

103 See n.85, supra

Broadcasters' study attempts to show that opportunities for parental supervision are extensive, it fails to demonstrate that meaningful parental supervision is possible as a practical matter.104/ Indeed, in view of the substantial amount of unsupervised viewing and listening by children, the number of children who are without parental supervision and the factors interfering with parental ability to supervise children's viewing and listening effectively, we must conclude that time channeling would be an ineffective means of protecting children from broadcast indecency.

75. Several commenters also argue that, because the Commission's definition of indecency and its indecency enforcement policies are allegedly vague, unless a time channeling approach is adopted in lieu of a 24-hour prohibition, the threat of sanctions could deter some broadcasters from presenting programs that are not actually indecent.105/ C&M maintains that time channeling recognizes the rights of broadcasters to transmit constitutionally protected indecent speech and the rights of listeners to receive indecent programming.106/ This request for a "safe harbor" to present indecent programming reflects a belief that a broadcaster cannot determine with any degree of certainty whether a specific program violates the guidelines adopted in this proceeding. This is incorrect. Our definition of indecency, read in conjunction with our decisions in enforcement actions, provides licensees sufficient guidance to decide whether a program would be indecent.

104 See ¶¶ 57-64, supra.

105 See Post Comments at 1-2; Cox Comments at 24-25.

106 C&M Comments at 28-30.

2. Ratings and Warning Devices

76. Another alternative to a 24-hour prohibition of broadcast indecency is the use of a voluntary industry ratings code for television and radio broadcasts. The ratings, which would be published in television and radio guides and announced prior to each program, would alert the viewer or listener to the content of the program. We conclude that ratings and warnings would not effectively limit children's exposure to indecent programming, since this method would require parents to actively supervise their children's listening and viewing at all hours and in all locations. The effectiveness of ratings and warnings is further reduced by random tuning behavior known as "grazing," in which viewers use television remote control or radio scanning devices to rapidly tune through the entire channel menu until they find something interesting enough to hold their attention.

77. The NOI requested comment regarding the use of a voluntary industry ratings code for television and radio broadcasts. However, the NOI expressed doubt that ratings and warnings would prevent minors from viewing or listening to indecent programming because the broadcast audience is constantly tuning in and out of programs, and suggested that random tuning behavior may be even more prevalent today than when Pacifica was decided in 1978.107/ The NOI suggested that children could be exposed to different programming in rapid succession without warning as to content either because they graze or because they are co-viewing with others who are grazing.

107 NOI at 8363 and n.44. The Pacifica Court noted, "Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content." 438 U.S. at 738.

78. Several commenters address the possible use of ratings and warning devices. USCC and KDVS suggest that a combined time channeling and ratings system could be effective.108/ However, AFA and Salem surggest that ratings require parental supervision in order to be effective.109/ Other commenters fear that an indecency warning could attract children to a particular broadcast110/ or that a warning could serve to "license" an indecent broadcast by warning the viewer of content.111/ Several commenters also specifically responded to the Commission's discussion of grazing. Broadcasters submits a study conducted by Arbitron and NAB of 13,000 radio listeners aged 12 and over showing that this group listened to an average of 2.99 radio stations per week.112/ Broadcasters concludes that this study indicates that neither adults nor children engage in significant random tuning for radio. Pacifica claims that radio listeners, especially those who listen to noncommercial radio stations, do not engage in grazing.113/ On the other hand, others contend that grazing is prevalent.114/

79. We conclude that ratings and warnings would not effectively limit children's exposure to indecent

108 USCC Comments at 6; KDVS Comments at 1.

109 AFA Comments at 46; Salem Reply Comments at 72.

110 Beams Reply Comments at 10; Salem Reply Comments at 72; AFA Comments at 46.

111 MIM Reply Comments at 30.

112 Broadcasters Reply Comments at 9, n.17.

113 Pacifica Comments at 21-23.

114 AFA Comments at 44-46, n.65; Salem Reply Comments at 72, n 105; MIM Reply Comments at 35-36.

programming. Currently there is no device which would permit a parent to "lock out" programming. Unless it were practical for parents to supervise viewing at all times, a child may ignore a warning and view or listen to indecent programming. Indeed, a warning may attract a child's attention and lead the child to view or listen to the program. This is of particular concern because of the significant amounts of unsupervised viewing and listening by children. We also believe that grazing is sufficiently common to reduce the effectiveness of ratings, even if a child is supervised. Grazing and channel changing by either a parent or a child may cause the viewer or listener to miss a content warning.115/ We believe the study cited by Broadcasters indicating the average number of radio stations listened to per week is not relevant in determining whether grazing occurs. Grazing involves turning to a number of channels in a short period of time, and such rapid switching may not be rejected in ratings. Broadcasters do not state whether the study asked listeners if they engaged in grazing to find those channels, or if they ever engaged in grazing. Therefore, we conclude that lack of parental supervision, coupled with the proclivity of viewers and listeners to graze, would undermine the efficacy of a system of ratings and warnings.

3. Broadcast Technologies

80. The NOI requested comment on whether there are feasible broadcast technologies that could restrict children's access to indecent broadcasts. We conclude that although such technology may be feasible, no such technologies are currently available to the public for this purpose.

115 We note that the broadcast in question in Pacifica was heard by a man while driving with his young son, and that the parent apparently missed the warning aired before the broadcast. Pacifica, 438 U.S. at 730.

81. The NOI suggested that the FM or television aural subcarrier could be used for the broadcast of audio indecency. The subcarrier signal would be receivable only by special decoders. Salem supports the NOI's assessment that subcarriers could be used to provide audio indecency – Salem maintains that an FM station could install a subcarrier signal generator at minimal expense, and that decoders for home use currently cost approximately $60, but could be expected to fall in price if produced in large quantities.116/ John W. Olivo, Jr., suggests use of a signal that would permit electronic blocking of programs by home receivers. KDVS, however, suggests that alternative broadcast technologies may not be financially feasible for many broadcasters, particularly noncommercial stations.117/

82. As another alternative, NRB suggests that the Commission permit the broadcast of scrambled indecent material at any hour.118/ Kennedy Broadcasting ("Kennedy") similarly suggests that low power television (LPTV) stations be permitted to offer adult-oriented programming if scrambled. NRB and Kennedy argue that the decoder necessary to view scrambled programming would protect children from indecent material in much the same way as a cable lock-box or parental key. Kennedy also asks the Commission to state whether indecency standards will be applied to subscription television.

83. With respect to scrambling, we note our previous statements that we do not impose regulations regarding indecency on encrypted services, such as subscription

116 Salem Reply Comments at Appendix 18.

117 KDVS Reply Comments at 7.

118 NRB Reply comments at 13.

television, that lack "theindiscriminate access to children that characterizes broadcasting." Video 44, 3 FCC Rcd 757, 760 n.2 (1988), rev. on other grounds sub nom. Monroe Communications Corp. v. F.C.C., 900 F.2d 351 (D.C. Cir. 1990). While signal blocking and subcarrier use appear to be technologically feasible to prevent reception by individuals not wishing to receive certain signals, neither is available today, so we cannot rely on these technologies either to protect children from exposure to indecent broadcasts or to assist parents in supervising their children's viewing and listening. Use of a signal as suggested by Olivo also is not available today nor expected to be available in the foreseeable future, and may or may not prove practical. However, we encourage interested parties to continue to bring to our attention technologies or other means capable of restricting access by children to indecent broadcast programs.

F. Non-Broadcast Alternative Programming Sources

84. We recognize that we must be sensitive to the concern of the Supreme Court that the adult population not be reduced to seeing or hearing only what is fit for children.119/ In Pacifica, the Supreme Court recognized that non-broadcast alternatives to broadcast indecency are available to adults, including tapes, records, theaters and nightclubs. The NOI requested comment on whether these non-broadcast alternatives and additional non-broadcast alternatives, including cable with a lock-box capacity, videocassettes, audiocassettes, and motion pictures, provide

119 Butler v. Michigan, 352 U.S. 380, 383 (1957). In striking down a state statute that prohibited the sale to adults as well as to children of books "tending to the corruption of the morals of youth," the Court held that the statute was not reasonably tailored to its expressed purpose. In this case, a book arguably within the prohibited category was sold to an adult, and the Court stated that the effect of the statute was to reduce adults to reading only what is fit for children.

adults with access to visual and audio programs functionally equivalent to those that would be proscribed from broadcast. We noted that cable television, a non-broadcast alternative not mentioned by the Pacifica Court, provides adults with access to programming designed for mature audiences yet incorporates equipment that facilitates parental control over the viewing of their children. Several commenters agree with the Commission's assessment that adults have many alternative sources of indecent material.120/ AFA submits an analysis of the MPAA ratings for 1,309 movies shown on premium cable services from December 26, 1987, through January 12, 1990, and claims that 663, or 51%, were R-rated.121/

85. In response, Broadcasters argues that total suppression of indecent material in the broadcast medium would deprive adults of their ability to receive protected material, and thereby would violate their First Amendment rights,122/ because much material that might be indecent either is not available elsewhere or could be found only with time or effort. Broadcasters also claims that live radio and television talk shows, special news reports, public affairs programs, and many made-for-television entertainment programs are not available elsewhere. Broadcasters maintains that at least seven of the broadcast programs that triggered Commission action in 1989 contained material that was

120 See Bonneville Comments at 8-9; AFA Comments at 49-52; AFA Reply Comments at 34-36.

121 AFA Comments at Appendices 4 and 5. In addition, Appendix 3 lists over 200 titles of videotapes available through sexually-oriented magazines.

122 Broadcasters Comments at 6. See also PEN Comments at 8-9.

unavailable in any other medium.123/ Even if some material is available, Broadcasters asserts, many adults will be deterred from obtaining the material because they will have to determine if the material is available and then purchase it. Furthermore, the timeliness of the material will be lost and, with it, a large measure of at least some of the programs' value.124/ Broadcasters also argues that adults' ability to purchase indecent material is irrelevant constitutionally because the Supreme Court has "made clear that free speech may not be 'abridged on the plea that it may be exercised in some other place.'"125/ Broadcasters also claims that "every decision cited in the long history of this proceeding, whether in broadcasting, cable, telephone, or print, unhesitatingly concluded that blanket bans on indecency violate the First Amendment."126/

86. We conclude that a 24-hour prohibition on broadcast indecency will not, in the words of the Pacifica Court, "reduce adults to hearing [or seeing] only what is fit for children."127/ The Court specifically referenced Butler in affirming the Commission's action in Pacifica, noting that "[a]dults who feel the need may purchase tapes and records or go to theaters and nightclubs to hear these words." 438 U.S. at 750 n.28. See also 438 U.S. at 760 (Powell, J.,

123 Broadcasters Reply Comments at 3. Six of the broadcasts mentioned by Broadcasters consisted of radio talk shows, and the seventh included a live telephone conversation.

124 Broadcasters Comments at 8-9.

125 Broadcasters Comments at 9, citing Schneider v. State, 308 U.S. 147 (1939).

126 Broadcasters Comments at 9-10.

127 Pacifica, 438 U.S. at 750 n.28.

concurring). Thus, the Court has recogned that the opportunity to obtain access to indecent material through other outlets is sufficient even if those outlets are not absolutely fungible with broadcasting.

87. In addition, indecent material is available on media that are largely indistinguishable, from the viewer's perspective, from broadcast television, although their characteristics facilitate restricting access to adults. Parties do not question that adults can obtain indecent material through cable television, wireless cable,128/ home satellite dishes,129/ or satellite master antenna television systems (SMATV)130/ and, soon in the future, DBS.131/ We note, for example, that as of July, 1990, 53.9 million households, or 58.6% of the total television households, subscribed to cable, and 71.3 million television households were passed by cable.132/ The individual who seeks indecent material via cable television need not leave his or her home to obtain the material. Furthermore, through the use of a lock-box or parental key, parents can control children's viewing, even

128 "Wireless cable" is a relatively new service that provides multiple channels of video entertainment and informational programming using microwave frequencies and special reception equipment. Currently there are 50 or more systems operating in the United States, and numerous additional systems are planned. See Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, Report, MM Docket 89600 at 53 (released July 31, 1990, FCC 90-276).

129 An estimated 2.8 million home satellite dishes are in use. Id. at 55.

130Approximately 500,000 viewers subscribe to SMATV service. Id. at 57.

131 See Id. at 56.

132 See Broadcasting, July 16, 1990, at 94.

permitting children to view indecent material if parents believe that doing so is in a child's best interest. AFA in its comments demonstrates that a significant number of R-rated movies are shown on cable. Accordingly, imposition of a 24-hour prohibition on broadcast indecency will not significantly interfere with the ability of adults to view or listen to indecent programming.

88. Moreover, Butler does not address the situation presented here, in which there is no feasible way to offer adults access to the medium without offering access to children. Butler concerned the sale to adults of books "tending to incite minors to violent or depraved or immoral acts manifestly tending to the corruption of the morals of youth." 352 U.S. at 381. Distributors of books or other media such as magazines, movies, and video and audio cassettes, with a salesperson behind the counter, have the means to control access by children at their point of sale or access. Thus, in the words of Justice Powell, "dissemination of this kind of speech to children may be limited without also limiting willing adults' access to it." Pacifica, 438 U.S. at 758 (Powell, J., concurring). Broadcasting, however, has no salesperson behind the counter or lock-box which parents may use to control access. Unlike other media, broadcasting is delivered directly into the privacy of the home and does not distinguish among recipients. Accordingly, "such a physical separation of the audience cannot be accomplished in the broadcast media. . . . [T]he broadcaster cannot reach willing adults without also reaching children." Id. at 758-759. Butler simply does not address the conflict between adults' right to obtain indecent material and the need to protect children from exposure to such material in the broadcast medium. We believe, however, that the established compelling interest in protecting children, coupled with the impossibility of separating children from adults in the

broadcast audience, must outweigh the right of adults to view or to hear broadcast indecency, especially when adults can readily see or hear such material on widely available and readily accessible media which can separate children and adults. As Justice Powell said, Butler's attentiveness to adults' rights "is not sufficiently strong to leave the Commission powerless to act" to control broadcast indecency. Pacifica, 438 U.S. at 760 (Powell, J., concurring).

G. Enforcement

89. The foregoing demonstrates that only a 24-hour prohibition would effectively serve to protect children from broadcast indecency. Nonetheless, although audience surveys and data demonstrate the likelihood that significant numbers of children may be found in broadcast audiences at all times of the day and night, in the future we will consider, on a case-by-case basis, evidence from a station charged with indecent broadcasting that the data concerning children's viewing or listening are not applicable in it.~ specific market. In other words, we will permit the broadcaster to submit evidence illustrating that only "a few of the most enterprising and disobedient young people" are in the broadcast audience in the station's market at the time of the broadcast in question. In this regard, stations will not be required to show that children were not in the market audience on the specific date and at the specific time that the allegedly indecent program was aired (e.g., Thursday, July 12, 1990 at 11:30 p.m.). Rather, stations will be permitted to demonstrate through ratings data or other probative evidence that children typically are not in the audience on the day and at the time in question (e.g., Thursday nights at 11:30 p.m.). This policy will ensure that enforcement of the broadcast indecency statute will be narrowly tailored to situations in which there is in fact a risk that children are in the audience. We do not

believe this requirement is unduly burdensome for a licensee.133/

90. We note that in several prior instances, parties have responded to Letters of Inquiry or Notices of Apparent Violations with data which, they argue, demonstrate that few or no children were likely to have been listening to their particular station when the alleged indecent language was aired. Listeners and viewers, however, often switch indiscriminately from station to station and, particularly in the case of radio, "tune into a station generally without the benefit of a schedule of programs or warning as to potentially offensive content." In re Pacifica, 2 FCC Rcd at 2701, citing Pacifica, 438 U.S. at 760 n.2 (Powell, J., concurring). As a result, if children in a given market are in the broadcast audience, they may well tune into a particular station when "grazing" through different channels on their radio or TV set. Accordingly, to ensure that children are not exposed to indecent programming, we will require a station defending against a broadcast indecency complaint to demonstrate that children in fact are not in the broadcast audience for the entire market, not Just the particular station, at the time it aired the allegedly indecent material.

IV. CONCLUSION

91. Based upon the information contained in the record and discussed in this Report, and our analysis of the applicable constitutional law as recently set forth by the Supreme Court in Sable, we conclude that the 24-hour

133 We note that broadcast licensees are obligated to know and to serve the special needs of children, see Children's Television Programming, 55 R.R.2d 199, 214 (1984), and as a result, they appear to be uniquely able to demonstrate that children are not present in the listening or viewing audience.

prohibition on broadcast indecency is the most narrowly tailored means of protecting children from indecent material. In 1988 Congress, concerned with children's access to indecent material through broadcast stations, statutorily required this Commission to enforce the prohibition against indecent material on a 24-hour-a-day basis. In response to the Court's remand of the record in ACT II, in which the validity of the statute and the Commission's implementation of it was put at issue, we have conducted a full and fair proceeding to assess the validity of the 24-hour prohibition. In the NOI, we invited comment on a broad range of relevant issues and received comment on these and additional issues that responding parties wished to address. Over 92,500 comments have been received in response to this NOI, the vast majority of which favor the 24-hour prohibition.

92. Congress and the courts have determined that indecent material is potentially harmful to children. The Commission's definition of indecency has been affirmed by the Supreme Court, and permits broadcasters to identify material that is indecent. Because data gathered in this proceeding establish that children are in the broadcast audience at all times of the day and night, we do not believe that a channeling mechanism will accomplish the compelling governmental purpose of protecting children. Adults, on the other hand, have other means to access such material should they so desire.

93. To comply with Sable's requirement that the means to accomplish the governmental interest be tailored as narrowly as possible, we have decided, when enforcing the 24-hour prohibition, to consider on a case-by-case basis any information that children are not in the broadcast audience in the market of the station accused of airing indecent material. This policy, we believe, will ensure that enforcement actions

are taken only against those stations that broadcast indecent material when children are in the audience.

V. ORDERING CLAUSES

94. Accordingly, IT IS ORDERED, That the late filed reply comments of AFA ARE ACCEPTED.

95. IT IS FURTHER ORDERED, That upon release, the General Counsel IS INSTRUCTED to submit this Report to the U.S. Court of Appeals for the District of Columbia Circuit in response to the remand of the record in Action for Children's Television v. F.C.C., No. 88-1916.

96. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

The following parties filed formal comments:

1. Action for Children's Television, American Civil Liberties Union, Association of Independent Television Stations, Inc., Capital Cities/ABC, Inc., CBC, Inc., Infinity Broadcasting Corporation, Motion Picture Association of America, Inc., National Association of Broadcasters, National Broadcasting Company, Inc., National Public Radio, People for the American Way,

Post-Newsweek Stations, Inc., Public Broadcasting Service, Radio-Television News Directors Association, Recording Industry Association of America, The Reporters Committee for Freedom of the Press, and Society of Professional Journalists (Broadcasters).

2. American Family Association, Inc. and Children's Legal Foundation, Inc., submitted on behalf of American Family Association, Advent Christian General Conference, Baptist General Conference, Catholic Center, Christian Standard, Conservative Congregational Christian Conference, Children's Legal Foundation, Assembly of God, Associate Reformed Presbyterian, Central Presbyterian Church, Conservative Baptist Association, Diocese of Eau Claire, Evangelical Free Church of America, General Association of General Baptists, International Pentecostal Church of Christ, North American Christian Convention, Wesleyan Church, General Association of General Baptists, General Conference Mennonite Church, Missionary Church, and Open Bible Standard Churches (AFA).
3. Arizona Board of Regents for Benefit of the University of Arizona, Arkansas Educational Television Commission, Board of Regents of the University of Houston System, Board of Trustees of the University of Illinois, Council for Public Television, Channel 6, Inc., Greater Dayton Public Television, Inc., Maryland Public Television, Milwaukee Area District Board of Vocational, Technical and Adult Education, Nebraska Educational Telecommunications Commission, The Ohio State University, Public Television 19, Inc., The Regents of the University of New Mexico and the Board of Education of the City of Albuquerque, New Mexico, St. Louis Regional

Educational and Public Television Commission, The University of Nebraska, WITF, Inc., and WSKG Public Telecommunications Council, in a pleading entitled "Joint Comments of Noncommercial Parties" (Joint Parties).

4. Bonneville International Corporation (Bonneville).
5. Capital Cities/ABC, Inc. (ABC).
6. Cohn and Marks Law Firm (C&M).
7. Cox Enterprises, Inc. (Cox).
8. Marc Dyer (Dyer).
9. Evangelical Free Church of America (Evangelical).
10. Gospel Opportunities Inc. (Gospel).
11. Kennedy Broadcasting, Inc. (Kennedy).
12. Morality in Media, Inc. (MIM).
13. John W. Olivo, Jr. (Olivo).
14. Pacifica Foundation, the National Federation of Community Broadcasters, P.E.N. American Center, and Allen Ginsberg (Pacifica).
15. P.E.N. American Center, William S. Burroughs, Allen Ginsberg and Michael McClure (PEN).
16. Post-Newsweek Stations, Inc. (Post).
17. United States Catholic Conference (USCC).
18. University of California Radio Network and Station KDVS-FM (KDVS).

The following parties filed formal reply comments:

1. Broadcasters.
2. AFA.
3. American Academy and Institute of Arts and Letters statement.
4. Lynda Beams (Beam).
5. Central Communications and Electronics, Inc. (Central).
6. City Lights Booksellers & Publishers, Sandra Lee Golvin, David H. Halperin, Eileen Myles, Ron Padgett and

Patrick Zale (City Lights).

7. Allen Ginsberg.
8. Barbara M. Hattemer (Hattemer).
9. Kenneth C. Hill.
10. KDVS.
11. MIM.l/
12. National Religious Broadcasters (NRB).
13. PEN.
14. Salem Communications Corporation and Focus on the Family (Salem).

1 MIM also filed further reply comments.

MIM Docket No. 89-494

Concurring Statement
of
Commissioner James H. Quello

In the Matter of Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464.

I concur in the judgment because Congress unequivocally declared that the Commission "shall promulgate regulations . . . to enforce the provisions of [section 1464] on a 24 hour per day basis."1/

I agree completely with the Report's conclusion that our interest in helping parents control their childrens' media viewing habits is paramount. The courts have recognized that protecting the physical and psychological well-being of children is a compelling interest. *See, e.g., Sable Communications of California, Inc. v. FCC,* 109 S. Ct. 2829, 2836 (1989).

Given the vital nature of this interest, it is important to keep in mind that this Report will be subject to immediate judicial scrutiny as the pending litigation regarding the 24 hour ban resumes.2/ Thus far, the courts have never upheld a ban on indecent material for any medium, and have struck

1*Making Appropriations for the Department of Commerce, Justice, and State, the Judiciary, and Related Agencies for the Fiscal Year Ending September 30, 1989, and for Other Purposes,* Pub. L. No. 100-459, § 608,102 Stat. 2186, 2228 (1988).

2*Action for Children's Television v. FCC,* No. 88-1916 (D.C. Cir. 1989) (remanding issue of 24 hour ban to the Commission for "a full and fair hearing on . . . the propriety of indecent broadcasting").

down regulations deemed to be excessively burdensome.3/ Perhaps for that reason, we might have gone farther in this Report to obtain empirical evidence of the viewing habits of children 12 and under.

Ever since I came to the Commission some 16 years ago, I unhesitatingly have pointed out the need to enforce our rules against those few licensees who go too far. At times in the past I felt like the only Commissioner who favored this policy. Nevertheless, I think it is important to give credit where it is due to the broadcast industry. Thus, while it may be true, as the Report points out, that theatrical presentations of certain films such as "Deep Throat" or"Debbie Does Dallas" have not been held to be obscene, it is also a fact that there has never been a threat that movies of this type would show up on broadcast television. Citing such hard core films,

3E.g., *Sable Communications of California, Inc.*, 109 S. Ct. at 2836-39; *Wilkinson v. Jones*, 480 U.S. 926 (1987) (mem.), *aff'ing*, 800 F.2d 989 (10th Cir. 1986), *aff'ing sub nom. Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099 (D. Utah 1985); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983); *Sable Communications of California, Inc. v. Pacific Telephone & Telegraph Co.*, 890 F.2d 184 (9th Cir. 1989); *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988); *Carlin Communications, Inc. v. FCC*, 837 F.2d 546 (2d Cir. 1987), *cert. denied*, 109 S. Ct. 305 (1988) *("Carlin III"); Carlin Communications, Inc. v. FCC*, 787 F.2d 846 (2d Cir. 1986) *("Carlin II"); Cruz v. Fere*, 755 F.2d 1415 (11th Cir. 1985); *Carlin Communications, Inc. v. FCC*, 749 F.2D 113, 114 (2d Cir. 1984) *("Carlin I"); Fabulous Associates, Inc. v. Pennsylvania Public Utility Comm'n*, 693 F. Supp. 332 (E.D. Pa. 1988).

I think we make a case that broadcasting is a more pervasive medium than those involved in previous cases. However, congressional sponsors of the ban on indecent dial-a-porn legislation stated that [t]elephones are precisely like radio and television because of their easy accessibility to children and the virtual impossibility for parents to monitor their use and asked [i]s there really a medium more pervasive than the telephone? 134 Cong. Rec. H1694 (April 19, 1988) (remarks of Rep. Bliley).

describing sex magazines, sex manuals and pornographic playing cards, the Report of the Commission strays far afield from the legitimate concern with broadcast indecency and runs the risk of tarring broadcasters with too broad a brush. No licensee in America has ever aired the type films listed in the Report, and, to my knowledge, no licensee has ever considered doing so. Even on cable television, where courts have found a greater right to transmit such material, operators have steered clear of hard core fare except in a very few instances.4/

Indeed, the broadcast industry has exhibited commendable sensitivity for issues of indecency, as befits their status as public trustees. In this regard, the Board of Directors of the National Association of Broadcasting last month issued a Statement of Principles for radio and television broadcasting. The Statement addressed various areas of programming content in order to "reflect what [the NAB] believes to be the generally-accepted standards of America's radio and television broadcasters." With respect to sexually oriented material, the Statement provided, in relevant part:

> "Programming that purely panders to prurient or morbid interests should be avoided.

4While I understand that examples of hard core pornography were identified to illustrate the broad range of material encompassed within indecency Report of the Commission at ¶ 27, it would be we for us to remember that this "broad range" encompasses progra mming of real merit. *See, e.g.*, Hickey, *Four Letters Spell Dilemma on TV News*, WASHINGTON TIMES, June 29, 1990 at B6 (detailing ways in which television stations modified their coverage of the Vista Hotel sting operation in the Marion Barry drug and perjury trial).

> Where significant child audiences can be expected, particular care should be exercised when addressing sexual themes.
>
> Obscenity is not constitutionally-protected speech and is at all times unacceptable for broadcast.
>
> All programming decisions should take into account current federal requirements limiting the broadcast of indecent matter."

Although the Statement of Principles is advisory only,5/ such efforts by broadcasters should be recognized and appreciated.

Finally, I agree with the Report that adults who wish to view indecent material have access to such programming from other media.6/ But I hesitate to conclude that the other sources are "largely indistinguishable" from, or "functionally

5Unlike the NAB's Television Code, which for thirty years provided broadcasters with guidelines for meeting their statutory obligation to serve the public interest, the Statement of Principles provides no means of enforcement. The NAB unfortunately is barred from doing more by a judicial holding that the Television Code violates antitrust laws. *See United States v. National Ass'n. of Broadcasters*, 536 F. Supp. 149 (D.D.C. 1982). This decision was a disservice to the American public that I hope will be overturned by congressional action. *See, e.g., TV* Violence Act, S. 593, which would grant antitrust immunity to allow the industry to adopt voluntary guidelines to help control depictions of violence, sexually explicit material and use of illegal drugs.

6Adult programming is widely available on audio and video cassettes, cable television and in theatres. But as I expect the Commission to conclude in our upcoming report to Congress on cable television, MMDS is not a widespread alternative and DBS does not yet exist. Even cable is unavailable to some twenty percent of television households and approximately 43 percent of homes passed do not subscribe.

equivalent" to broadcasting. Report ¶¶ 79, 83. Such a characterization tends to undermine the public interest standard that makes broadcasting unique. For if we must consider the overall media environment to gauge whether or not the public has adequate access to information, it weakens the rationale for imposing special information obligations on Commission licensees. Suffice it to say that if adults wish to go to the extra trouble of obtaining indecent programming, nothing we do today prevents them from doing so.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of	)
Enforcement of Prohibitions	) MM Docket No. 89-494
Against Broadcast Indecency	)
In 18 U.S.C. Section 1464	)

COMMENT ON NOTICE OF INQUIRY

Submitted by:

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Glen O. Spence
Executive Secretary

INTRODUCTION

This comment is prepared in response to the Notice of Inquiry released November 20, 1989, in accordance with section 1.415 and 1.419 of the Commission's rules. The American Family Association and Children's Legal Foundation are non-profit organizations created to promote traditional family values through law enforcement and public education.

Advent Christian General Conference; Assembly of God; Baptist General Conference; Associate Reformed Presbyterian; Catholic Center; Central Presbyterian Church; Christian Standard; Conservative Baptist Association; Conservative Congregational Christian Conference; Diocese of Eau Claire; Evangelical Free Church of America; General Association of General Baptists, Social Issues Commission; General Association of General Baptists; General Conference of Mennonite Church; International Pentecostal Church of Christ; Missionary Church; North American Christian Convention; Open Bible Standard Churches; and Wesleyan Church represent major religious denominations throughout the United States and are concerned with the preservation of moral traditions in America.

This comment will serve to support the proposed 24-hour proscription of indecent material on broadcast television and radio. Such a prohibition is essential to preserve the moral fiber of the nation and to maintain the integrity of the American family.

GOVERNMENTAL INTEREST IN PROTECTING RESIDENTIAL PRIVACY

The Supreme Court has long recognized that each means of speech or expression presents unique First Amendment problems. Joseph Burstyn, Inc. v Wilson, 343 U.S. 495 (1952). Broadcasting, of all of the forms of communication, receives the least First Amendment protection. Federal Communications Commission v Pacifica, 438 U.S. 726 (1978). In Pacifica, the

Court explained why this is the case:

> First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. . . . Second, broadcasting is uniquely accessible to children, even those too young to read.

438 U.S. at 748.

In discussing the first reason or basis, "pervasive presence," for the lesser protection of broadcast, the Court emphasized the individual's right to be "left alone" in the privacy of the home.

The protection of residential privacy is well-established in a long line of Supreme Court cases as being an important and significant governmental interest. In Rowan v United States Post Office, 397 U.S. 728 (1970), the challenged statute authorized a householder to require that a mailer of pandering advertisements remove his name from its mailing lists and stop all future mailings to him. The mailers contended that the statute violated their rights of free speech guaranteed by the First Amendment. The Court examined the statute in light of the First Amendment challenge by balancing "the right of every person 'to be let alone' . . . with the right of others to communicate." 397 U.S. at 736. In doing so, the Court stated:

> In today's complex society we are inescapably captive audiences for many purposes, but a sufficient measure of individual autonomy must survive to permit every householder to exercise control over unwanted mail. . . . The ancient concept that "a man's home is his castle" into which "not even the king may enter" has lost none of its vitality, and none of the recognized exceptions includes a right to communicate offensively with another.

397 U.S. 736-37 (emphasis added).

Again, in Carey v Brown, 447 U.S. 455 (1980), the Supreme Court recognized the importance of residential privacy when

examining an Illinois statute which barred picketing of residences:

> Preserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value. Our decisions reflect no lack of solicitude for the right of an individual "to be let alone" in the privacy of the home, "sometimes the last citadel of the tired, the weary, and the sick." * * *. The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.

447 U.S. at 471 (citations omitted).

Recently, in another residential neighborhood picketing case, Frisby v Schultz, 487 U.S. 474, 101 L.Ed. 2d 420 (1988), the Court reiterated the utmost importance of preserving the sanctity of the home:

> One important aspect of residential privacy is the protection of the unwilling listener. Although in many locations, we expect individuals simply to avoid speech they do not want to hear, fc. Erznoznik v Jacksonville, supra, at 210-211, 45 L.Ed.2d 284, 95 S.Ct. 1780 (1971), the home is different. . . . Instead, a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom. See, e.g., FCC v Pacifica Foundation, 438 U.S. 726, 748-749, 57 L.Ed.2d 1073, 98 S.Ct. 3026 (1978) (offensive radio broadcasts); id., at 759-760, 57 L.Ed.2d 1073,

98 S.Ct. 3026 (Powell, J., concurring in part and concurring in judgment (same); Rowan, supra (offensive mailings); Kovacs v Cooper, 336 U.S. 77, 86-87, 93 L.Ed.2d 513, 69 S.Ct. 448, 10 ALR 2d 608 (1949) (sound trucks).

487 U.S. at 484-85, 101 L.Ed. 2d at 431-32.

Therefore, as demonstrated by this line of Supreme Court cases, the right "to be let alone" in one's own home is an important governmental interest. In essence, the concept of residential privacy has been extended to broadcasts received outside the home as exemplified by the Court's decision in Pacifica. Even within the most limited reading of Pacifica it is important to note that the broadcast was heard in an automobile, not in the home. Consequently, the protection afforded individuals through the concept of residential privacy would appear to have attached itself to the person for purposes of regulating indecent broadcasts. However, is this interest sufficient of itself to sustain a 24-hour prohibition against indecency?

In order to answer this question, a closer analysis of Pacifica and related decisions is necessary. In Pacifica, the issue before the Court was whether the FCC had the power to regulate a radio broadcast that was "indecent" but not obscene under 18 U.S.C. §1464. As stated another way by the Court, whether "when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power" depends "on proof that the pig is obscene." 438 U.S. at 750-51.

The controversy in Pacifica related to the broadcast of the George Carlin "Filthy Words" monologue by a New York radio station at about 2 o'clock in the afternoon. This broadcast contained very graphic language relating to excretory and sexual activities or organs. The monologue was included by the Court in an appendix to its decision. 438 U.S. at 751-55. Reacting to a complaint concerning the broadcast, the FCC issued a declaratory order granting the complaint; finding that the language as broadcast was indecent as prohibited by 18

U.S.C. §1464; and warning Pacifica that sanctions could have been imposed by the FCC, and might be imposed in the future, if additional complaints were received. 438 U.S. at 730-32.

The ultimate ruling by the Court in Pacifica was that the FCC did have the power to regulate an "indecent" broadcast, and that the government's power in this context goes beyond the proscription of that which is obscene. The Court was clear that its decision (and the FCC's) "rested entirely on a nuisance rationale under which context is all-important," requiring "consideration of a host of variables." 438 U.S. at 750 (emphasis added). The Court rejected the contention that its ruling would "reduce adults to hearing only what is fit for children," violating the principles expressed in Butler v Michigan, 352 U.S. 380 (1957). To the contrary, the Court stated that adults could hear this material through other mediums of communication. 438 U.S. at 750 n.28.

Because Pacifica rests on a nuisance rationale, under which context is all-important, a host of variables and factors need to be considered. The FCC in Pacifica emphasized the time of day of the broadcast. The Court suggested that the "content of the program in which the language is used will also effect the composition of the audience, and differences between radio, television, and perhaps closed-circuit transmissions, may also be relevant." Pacifica, 438 U.S. at 750. It may be that one variable is so important that it overrides every other factor. Thus, a particular broadcast may be so indecent, bordering on obscene, that a 24-hour prohibition of it would be justified, whether children were present in the audience or not, in order to protect the sanctity of the home.

Of course, the government's interest in preserving the privacy and sanctity of the home, although a significant interest, will never be the only interest or theory that supports a 24-hour prohibition of indecent broadcasts. In addition to the millions of American adults who support such a proscription, simply in terms of being protected from this offensive assault within the

walls of their homes,[1] a 24-hour prohibition will always be supported by an interest in protecting children.[2]

DEFINITION OF BROADCAST INDECENCY

The Supreme Court in Pacifica referred to the FCC's definition of "indecent" without explicitly approving or adopting it. The FCC had defined "indecent" as follows:

> [L]anguage that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.

438 U.S. at 732. Without addressing directly this definition, the Court held that "there is no basis for disagreeing with the Commission's conclusions that indecent language was used in this broadcast." 438 U.S. at 741.

The only time the Court defined "indecent in Pacifica it stated that "the normal definition . . . merely refers to nonconformance with accepted standards of morality." The Court further noted the statement of Commissioners Robinson and Hooks, who concluded:

> [W]e can regulate offensive speech to the

[1] The FCC should take note and include for consideration in this Notice of Inquiry, the tens of thousands of complaints, both formal and informal, it has received over the past ten years concerning the broadcast of indecent material.

Analogous to this concept of the intrusive nature of broadcast indecency is the receipt of unsolicited sexually oriented mail advertisements. The reaction from the public has been similar in each situation. Over 200,000 individuals have requested their names be placed on the Postal Service list to avoid receipt of such material.

[2] The appendices attached to the Notice of Inquiry demonstrate that there are always children present in the broadcast audience. To discount these numbers would be to say, as a matter of public policy, that it is permissible to injure a few thousand children each day to accommodate those few adults who wish to receive government-supported and authorized indecent material.

> extent it constitutes a public nuisance . . . . The governing idea is that "indecency" is not an inherent attribute of words themselves; it is rather a matter of context and conduct.

438 U.S. at 732 n.6. The Court went on to explain that the issue before them was limited to the question of whether the FCC had authority to proscribe this particular broadcast, Carlin's monologue, and that the FCC's order was "issued in a specific factual context . . . for indecency is largely a function of context—it cannot be adequately judged in the abstract." 438 U.S. at 742. The point being that the Court was not so concerned with defining "indecency" in precise terms, but more simply with answering the questions of whether the FCC, in the first instance, had the authority to impose sanctions on licensees who engage in indecent broadcasting, 438 U.S. at 738, and, if so, whether the FCC's order was appropriate in this specific factual context. The Court answered both of these questions in the affirmative, and, in response to the argument that the FCC's order would cause broadcasters to censor themselves, concluded:

> At most, however, the Commission's definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities.

438 U.S. at 743. In the Notice of Inquiry, the Commission invites comment on the current definition of broadcast indecency, "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." These commentators have no objection to this definition, but do object to the statement that follows the definition: "Such broadcasts are actionable when there is a reasonable risk that children may be in the audience." This statement is clearly incorrect in light of Pacifica. Whether there is a reasonable risk that children are in the audience is only one factor in determining when a broadcast is actionable as

indecent, not the exclusive factor. Broadcasts are "more" actionable when there is a reasonable risk that children may be in the audience, because of the added governmental interest in protecting children; however, the interest of adults "to be let alone" in their homes means that some programming would be actionable, even though every American child is unable to view or hear the material. Of course, this is a practical impossibility since as the Notice of Inquiry states, children are always in the radio and television audience.

The "indecency" of a particular broadcast cannot be determined independent of all of the facts and circumstances of a particular application – not just the time of day of the broadcast of the likelihood that children will be in the audience. This was precisely the approach taken by the Court in Pacifica in weighing the context and circumstances of the "Filthy Words" broadcast. The Court noted the statement of Commissioners Robinson and Hooks that "'indecency' is not an inherent attribute of words themselves; it is rather a matter of context and conduct." 438 U.S. at 732 n.6. The time of day of the broadcast is but one of the variables. For instance, the "Filthy Words" monologue may not have been "actionable" if broadcast at 2:00 a.m. instead of 2:00 p.m., given the assumption that fewer children or offended adults would be in the audience, and considering other variables such as warnings or previous complaints or lack thereof. 438 U.S. at 750 n.8. This does not mean, however, that nothing can be indecent between midnight and 6:00 a.m.

This is exactly the point that Justice Scalia made in his concurring opinion in Sable Communications of California, Inc. v Federal Communications Commission, 492 U.S. _____, 106 L.Ed. 2d 93 (1989). The concept of "indecency" is on a sliding scale, with all materials meeting the basic criteria of the FCC definition, but beyond that varying in degree of explicitness and lasciviousness. The more explicit or lewd the broadcast, and hence the closer to obscenity, then the less important other factors such as time and composition of the audience become.

The more mild the indecent broadcast, the more important the other variables become in determining if the programming is actionable. This is consistent with the nuisance rationale and approach taken by the Court in Pacifica.

While the legal definition of indecency appears to be well settled, it is important as an evidentiary matter to identify the types of material that have been found to be indecent and those that may potentially come within this definition. Appendix Six to this Comment contains the transcript of the George Carlin monologue as it appeared in the Supreme Court opinion and Appendix Seve contain excerpts of recent material found to be in violation of the indecency standards. The same arguments broadcasters make today regarding the overbreadth of the definition of indecency and the burden of self-censorship were all raised at the time of Pacifica and unequivocally answered by the Court. There is no indication that the rationale is not equally applicable today.

GOVERNMENTAL INTEREST IN PROSCRIBING INDECENCY

A 24-hour proscription of indecent broadcasts is supported by a number of governmental interests: preservation of the sanctity of the home; protection of children from indecent material; and facilitation of parental supervision and child rearing duties.

The Supreme Court has recognized these governmental interests in upholding a number of statutory schemes. In Ginsberg v New York, 390 U.S. 629, 640 (1968), the Court stated that "[t]he State also has an independent interest in the well-being of its youth." The Court went on to say:

> While the supervision of children's reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to

> them. It is, therefore, altogether fitting and proper for a state to include in a statute designed to regulate the sale of pornography to children special standards, broader than those embodied in legislation aimed at controlling dissemination of such material to adults.
>
> In Prince v Massachusetts, supra, at 165, 88 L.Ed.2d at 652, this Court, too, recognized that the State has an interest "to protect the welfare of children" and to see that they are safeguarded from abuses" which might prevent their "growth into free independent well-developed men and citizens."

390 U.S. at 640-41. This interest was so compelling that the Court approved legislation that shielded minors from the influence of material that is not obscene by adult standards.

The Court "recognized that there is a compelling interest in protecting the physical and psychological well-being of minors." Sable Communications of California, 106 L.Ed. 2d at 105 (1989). In addition, the Pacifica Court reiterated "that the government's interest in the 'well-being of its youth' and in supporting 'parents' claim to authority in their own household' justified the regulation of otherwise protected expression." 438 U.S. at 749. These same substantial reasons support a 24-hour prohibition on the broadcast of indecent material.

Judge Leventhal, in his dissent, in Pacifica Foundation v Federal Communications Commission, 556 F.2d 9, 37 (1977), made this point better than anyone else when he stated that such protections are reasonable:

> . . . to assist parents in their protection of young children during the uniquely prolonged period of development needed to permit the emergence of a competent and consenting person, and to protect some privacy in the home and in residential and civic neighborhoods that are

> family areas of shared community space. The latter consideration is not priggishness, but reflects a value that Alexander Bickel identified as society's concern with the quality of its community life. As for children, even assuming that children's exposure to pornography is as inevitable as pornography itself, there is protection in disapproval, in the child's knowledge that the pornography that is seen and heard is not approved by parent or society.

AGE GROUP OF CHILDREN TO BE PROTECTED

As the Notice of Inquiry sets forth in Appendix A, the vast majority of the states prohibit distribution of materials deemed "harmful to minors" to anyone under the age of eighteen. Six states and the District of Columbia restrict such material to children under the age of seventeen, three states to those younger than that, and one state, Wyoming, uses "under nineteen years" of age. The Commission's decision to use age seventeen and under is consistent with the various states' actions and is consistent with a number of other legal distinctions which are based on a child reaching the age of eighteen: the age of majority in most states, the legal voting age, and the age at which young men are subject to the Selective Service Act.

The establishment of "age" classifications will always be arbitrary to a certain degree, but the courts have held that this arbitrariness is not constitutionally fatal so long as there is a rational basis for the demarcation. It is rational to set the age at seventeen and younger in defining "children" for this inquiry, simply because it is consistent with other governmental acts of a related nature. Further, it is consistent with the Motion Picture Association of America (MPAA) code, which limits admission of children to sexually explicit movies.

PERVASIVENESS AND ACCESSIBILITY –

GENERALLY

This Notice of Inquiry has requested comment on several areas of broadcast television and radio pervasiveness and accessibility as they relate to a prohibition against the broadcast of indecent material. While this Notice of Inquiry focuses on children's accessibility to broadcast radio and television and its pervasiveness in their lives, it is equally important as a matter of policy and legal foundation to examine the pervasiveness of broadcast media in the lives of Americans generally.[3] As discussed above, it would be disingenuous to the language and intent of the Pacifica Court to rely solely upon the Government's obligation to protect children from exposure to indecent material as a basis for such regulation.

In Pacifica the Court specifically noted that "the broadcast media have established a uniquely pervasive presence in the lives of all Americans." 438 U.S. at 748 (emphasis added). To accurately measure pervasiveness and accessibility two different perspectives of each must be examined. These perspectives include a current composite of the pervasiveness of and accessibility to television and radio and a longitudinal examination of the degree to which television and radio have become more pervasive and accessible since the Court's review of the issue in Pacifica.

[3] "Yet television is the major purveyor of myths, especially those for adolescents. The medium has insinuated itself into everything, in fact, most of us spend our lives within yards of a video screen of some sort. Like the blob of cinematic lore, television has not just arrived on the planet, it has oozed everywhere. Like all mass media, it has adjusted to us before most of us could adjust to it. We can flip it on with the touch of a finger and so can our children. Once it's on, we are never more than a few channels away from some sequence of violence. What is on these screens is so transitory and yet so repetitive that sociologists use the terms 'video grazing' and 'video prospecting' to describe the process of adult watching. But 'glued to the screen' more accurately describes the youthful experience. Children seem so close to it that they appear to be in a different transmission loop." J. Twitchell, Preposterous Violence: Fables of Aggression in Modern Culture 83-84 (1989).

Television Accessibility

The longitudinal examination of television's accessibility is based upon the premise that the data the Supreme Court relied upon in 1978 in Pacifica to find the "uniquely pervasive presence" of the broadcast media is dated and the context in which the Supreme Court made its findings has changed. In other words the truth of the Court's conclusions in 1978 is magnified in today's light because of the degree of pervasiveness of and accessibility to broadcast media.

In 1977 there were an estimated 72,900,000 homes with television sets [4] and forty-five percent of those homes had two or more sets.[5]

In 1987 there were an estimated 89,130,000 households having at least one television set.[6] This number represents ninety-nine percent of all households in the United States.[7] An estimated fifty-seven percent of these homes had two or more sets.[8] In 1989, 90.4 million households had a television set and 63% of these homes had more than one set.[9] In addition, television sets may be found in office buildings, shopping malls, airports, child care centers, and hotels. In fact, the technology of television manufacturing has made it possible for a person to take a television set with him wherever he goes.[10] Consequently, the number of television sets generally reported greatly

[4] The World Almanac and Book of Facts 424 (1978).

[5] Id.

[6] The World Almanac and Book of Facts 363 (1988).

[7] Id.

[8] Id.

[9] Nielsen Media Research, Nielsen Report on Television 1989 3.

[10] In January 1982 Sony announced the manufacture of the television version of the Walkman. The television is the size of a wallet. The Economist 81 (Feb. 20, 1982).

"Sony Corp.'s soon-to-be-introduced 'Video Walkman' is already attracting a large number of potential buyers and, in a rare move, the electronics firm has revised its production plan upward prior to its scheduled unveiling on the

(Footnote Continued)

underestimates the actual number of television sets a person has access to at a given time.[11] The accessibility the Pacifica Court spoke of, while concedely significant, did not begin to contemplate an accessibility that permits children to watch television while going to and from school or while they wait to see the dentist.

Radio Accessibility

In 1979 there were an estimated 40,029,000 radios in the United States.[12] In 1987 ninety-nine percent of the households owned radios,[13] with an average of 5.4 radios per household.[14] The current estimates place the number of radios in use today at 530 million with an average of 5.6 radios per household.[15]

In addition to the increase in the number of radios per household, radio broadcasts may be a continual influence. Outside the home, radio broadcasts may be heard in doctors' offices, the workplace, restaurants, and the family car.[16] With the manufacture of the personal radio or Walkman, many people are rarely outside the hearing of a favorite radio station and can

(Footnote Continued)
market, slated for August 21.

The product, to be the smallest videocassette recorder, is described by Sony as a video version of the easy-to-carry Walkman cassette-recorder series. The new product combines a three-inch liquid crystal display (LCD) color television and an 8mm videocassette recorder. It weighs about 1.3 kilograms, including the cassette and the battery." Japan Economic Journal 11 (July 23, 1988).

[11] The data generally used to assess the viewership of television is compiled by the Nielsen Media Research organization. "The national Nielsens only count viewers in homes, not in college dorms, hotel rooms and such places as sports bars." J. Sharbutt, "NBC Survey", Associated Press (Sept. 18, 1989).

[12] Statistical Abstract of the United States No. 1002, p. 590 (1990).

[13] Statistical Abstract of the United States No. 878, p. 523 (1988).

[14] Id.

[15] Radio Advertising Bureau, Radio Facts for Advertisers 1989-90 (1989).

[16] An estimated 167.8 million cars, trucks and vans have radios in them. Id.

enjoy private listening in public places in which a radio would otherwise be prohibited.

As with television sets the number of radios per household significantly underestimates the true accessibility a person may have to a radio broadcast. Americans, adults and children alike, have the ability to listen to radio broadcasts any place at any time of the day.

Television Pervasiveness

Television pervasiveness includes both the number of hours a person spends viewing television and the number of television broadcasts available to the viewer. First, since 1979 the number of broadcast stations has increased significantly. In January 1979 there were 992 television stations on the air.[17] In January 1989, 1,395 television stations were on the air.[18]

Second, pervasiveness takes into account the number of hours such broadcasts are available. A recent study discussed this aspect of pervasiveness. "In the Chicago metropolitan area . . . most homes (without cable connection) could receive five VHF channels and at least three UHF channels. Most of these stations broadcast at least 20 hours per day, 7 days per week. In other words, for over 80% of all hours, day or night, in a week, there were at least eight different programs being broadcast simultaneously. In a typical week of 168 hours, there would be over 1,120 hours of programs broadcast."[19]

An additional aspect of television pervasiveness is the number of hours a person spends watching the television. In 1978 each person spent an average of 28 hours and 41 minutes a week

[17] Broadcasting Cable Yearbook 1989 H-59.

[18] Id.

[19] Heusmann & Eron, The Development of Aggression in American Children as a Consequence of Television Violence Viewing in Television and the Aggressive Child: A Cross-National Comparison 45 (L. Heusmann & L. Eron eds. 1986)

watching television.[20] Children under age five, women of all ages and men over fifty-five watched an above average number hours of television.[21]

TABLE 1
Average weekly viewing times – 1978

	TOTAL	MON-SUN 7:30-11p	MON-SUN 4:30-7:30p	MON-FRI 7a-4:30p	SAT-SUN 7-4:30p	MON-SUN 11p-7a
TOT PERS	28:41	10:54	6:36	5:10	2:51	3:09
W 18-24	30:05	10:14	6:01	7:13	2:24	4:13
25-54	32:14	12:34	6:07	7:06	2:15	4:11
55+	35:23	12:44	8:08	8:51	2:07	3:32
M 18-24	21:21	8:32	4:29	3:42	2:47	3:51
25-54	26:34	11:27	5:36	2:06	2:56	4:32
55+	32:40	12:25	8:10	5:14	3:16	3:36
TEENS-M	21:05	8:26	5:29	3:10	2:32	1:29
F	22:35	9:02	5:36	2:29	3:10	2:16
2-5	29:05	6:59	8:09	8:26	4:57	:33
6-11	26:40	9:20	7:44	5:44	4:45	1:04

Source: The World Almanac and Book of Facts 423 (1978).

In 1986 the average person watched an estimated 30 hours and 20 minutes of television per week.[22] Both men and women over 55 watched over the average thirty hours television each week.[23]

[20] The World Almanac and Book of Facts, 423 (1978).
[21] See, Table 1 above.
[22] The World Almanac and Book of Facts, 361 (1988) (citing A.C. Nielsen estimates Nov. 1986).
[23] See, Table 2 above.

TABLE 2

Average weekly viewing times -- 1986

	TOTAL	MON-FRI 10a-4:30p	MON-FRI 4:30-7:30p	MON-SUN 8-11p	SAT-SUN 7-11p	MON-FRI 11:30p-1a
TOT PERS	30:20	4:29	4:35	8:46	5:5	1:3
W 18+	34:39	6:20	4:56	10:16	4:1	1:24
18-24	26:09	5:24	3:25	7:06	5:1	1:14
55+	43:58	8:04	7:15	12:25	4:9	1:35
M 18+	29:23	3:09	4:07	8:56	3:9	1:20
18-24	20:20	3:34	2:44	5:06	4:2	5:5
55+	39:13	5:06	6:36	11:24	4:4	1:30
TEENS M	22:35	2:03	4:11	6:41	3:9	4:1
F	20:33	2:38	3:56	6:33	4:9	2:5
2-5	25:09	6:20	5:00	4:44	2:33	1:1
6-11	23:51	2:19	5:04	6:03	2:01	1:2

Source: The World Almanac and Book of Facts 361 (1988) (citing A.C. Nielsen estimates, Nov. 1986).

The range of averages is 20:20 for men 18-24 to 43:58 for women 55 and older.[24]

The final aspect of television pervasiveness involves the more recent ability viewers have to watch portions of several different programs within a given time period. This behavior has become known as "grazing". "Grazing" takes place when viewers flip through the television channels.[25] The impact of grazers on television viewing statistics is significant. According to a recent study conducted by Channels "75 percent of TV households have a remote control for either their TV or VCR, and that 54 percent have cable. * * *. Of the more than 80 percent who use it sometimes or frequently, almost half of them say they change channels during programs".[26] In actual numbers this means that a least 67.8 million households fit within the survey category.

When "grazers" turn on the television a significant number

24/ Id.

25/ How Americans Watch TV: A Nation of Grazers 5 (Channels Iy89) [hereinafter cited as Grazers]

26/ Grazers at 13.

will flip through the channels.

> Among those viewers who at least sometimes use their remote controls, about 40 percent say that at least half the time they sit down to watch TV, they flip through the channels. Men are more likely to do this than women, and young viewers are much more likely to do this than viewers 50 and older. While nearly one-quarter of the men say they do this almost every time they sit down to watch TV, only 10 percent of the women say the same thing. About one-third of the viewers 18 to 24 do so, compared with about 5 percent of the viewers 50 years of age and older.[27]

While "grazers" may not watch a greater number of hours of television than traditional viewers, they are exposed to a greater number of television programs. Consequently, their chances of being exposed to indecent material increases. Grazing has a major impact on the ability of viewers to be warned of indecent material that will be shown during the program. The concept that viewers select a television program and continuously watch it until its conclusion is not supported by this recent survey information. The significance of gazing with respect to the formulation of regulations concerning the broadcast of indecent material is that viewers are more likely to be assaulted by such material and that with the knowledge of these viewing patterns the broadcaster must bear the burden of reducing the frequency of such assaults.

Radio Pervasiveness

The pervasiveness of radio is slightly different from that of television. Radio originated as a medium in which a family would gather for an evening of entertainment or news. The early

27/ Grazers at 62.

days of radio featured fictional programs and series with a following much like that of television today. The present radio listener is much less apt to consciously select a particular radio station with the anticipation that he will hear a particular narrative. Today's listeners particularly those under 55, use radio as a source of background music or for news information.[28]

As with television stations, the number of licensed radio facilities has significantly increased. In January 1979 there were 4,549 AM stations and 4,089 FM stations on the air.[29] In January 1989, the number had increased to 4,932 AM stations and 5,529 FM stations on the air.[30]

As with television stations, many radio listeners are grazers. This is particularly true with listeners of car radios. While radio listening audience numbers are measured differently than those of television and may more closely consider grazers, the overall grazing effect is still a factor, as yet unquantified, to be considered.

Radio and television were "uniquely pervasive" by the Supreme Court standards of 1978. They continue to be so; in fact, the pervasiveness has become so ingrained into everyday life that the absence of these media would be readily apparent. The accessibility of radio and television broadcasts has only served to magnify their impact on the audience.

The data clearly show that broadcast radio and television are invasive in every aspect of life and command a significant portion of the average person's time and attention.

PERVASIVENESS AND ACCESSIBILITY – CHILDREN

Since there are no television or radio stations that broadcast

28/ "There is no question that children listen to audio media. Primarily they listen – like the rest of the population – for music." P. Christenson and T. Lindlof, The Role of Audio Media in the lives of Children, 9 Pop. Music and Soc. 25 (1983) [hereinafter cited as Audio Media].

29/ Broadcasting/Cable Yearbook 1989, H-59

30/ Id.

material exclusively for children, the conclusion of the same audience surveys should be applied to children. Identification of children in the viewing audience, as with adults is based largely upon A. C. Nielsen Co. surveys. Specifically when ratings surveys identify a certain percentage of children under the age of eighteen who listen to the radio or watch the television during a particular time of the day it is most likely that the children are hearing or watching the same program as their adult counterparts. There are certain surveys that have identified child viewers of children's programming.[31]

As an indication of the accessibility of broadcast media to children, a recent regional survey found that "46.6 percent of the total K-12 population reported having a television in the bedroom; 79.9 percent have a radio; 45.7 have a stereo; . . . and 12.9 percent have VCR."[32] Because of the affluence of the subject population, there is some thought that these numbers may overestimate the national average.

Additionally, there is some data concerning the radio listening habits of children. Several surveys have attempted to identify children's access to media in terms of the availability of a radio in the child's bedroom. These findings indicate that from

31/ There have been limited regional surveys completed to identify the number of hours of programming specifically created for children. A recent study found that "[c]hildren's programming is available on all over-the-air television, cable and pay cable services during weekdays and weekends in Champaign-Urbana and in fairly large amounts. Broadcast television provides 52 1/2 hours on weekdays, plus an additional 21 hours on weekends. Approximately half of this total was provided by the public television station." E. Wartella, K. Heintz, A. Aidman & S. Mazzarella, Television and Beyond: Children's Video Media in One Community 8 (Accepted for publication Comm. Res., Feb. 1990).

32/ Office of the County Superintendent of Schools, The Wired Bedroom: A Report of the Results of a Media Consumption Survey Conducted in Santa Barbara County 1 (unpublished May 1989) [hereinafter cited as The Wired Bedroom].

79.9%, as noted above, to 52%[33] of the children possess a radio. Under the terms of any survey, it is apparent that children constantly have almost immediate access to a variety of media.

The information concerning the actual viewing habits of children and the pervasiveness of television in their lives is limited. While viewer surveys generally identify only viewers over the age of six years, there is some data to support a need to monitor the viewing habits of preschool children and toddlers. In a survey of preschool children, researchers found that these children watched an average of 23 hours of television per week.[34] This same survey found that "[c]hildren . . . (over 75%) tend to watch TV chiefly during the hours of 4: 00 p .m. to 8:00 p.m., although a number of them are watching the action-detective shows later in the evening."[35]

The more interesting data concerns the impact of television programming on toddlers. A recent study found that:

> According to a recent Nielsen report (1987), the average 2-5 year old views about 28 hours per week of television, a figure compatible with a previous study showing that preschoolers spend over one-third of their waking time viewing TV (Friedrich & Stien, 1973). There is evidence for purposive, selective, and systematic viewing in children between 2 and 3 years of age (Anderson, Alwitt, Lorch & Levin, 1979; Anderson & Lorch, 1983) and it has been shown that by 3 years three-quarters of the children can name their

33/ P. Christenson and P. DeBendedittis, "Eavesdropping" on the FM Band: Children's Use of Radio, 36 J. Comm. 21, 30 (Spring 1986) [hereinafter cited as "Eavesdropping"].

34/ The authors found that "preschoolers are watching 23 hours per week on the average with a range of two hours to 72 (!) hours per week." Jerome L. Singer & Dorothy G. Singer, Television, Imagination and Aggression: A Study of Preschoolers 38 (1981).

35/ Id. at 39.

favorite TV program (Lyle & Hoffman, 1972).[36]

It is believed that children of all ages actively participate in television viewing.[37]

There have also been several studies that have attempted to quantify the television viewing time for teenagers. These estimates range from 3.5 hours per day[38] to 5.43 hours.[39]

Market information on radio use has attempted to quantify the listening time for children. During a given day (6 a.m. to

36/ A. Metzoff, Imitation of Televised Models by Infants, 59 Child Dev. 1221 (1988).

37/ "We and others (see, e.g., Anderson& Lorch, 1983; Anderson & Smith, 1984; Collins, 1983; Salomon, 1983) dispute the view that learning from television is inherently passive or superficial. We assume that children are active cognitive processors of their experience (Houston & Wright, 1983; Wright & Houston, 1983). They spontaneously select, organize, and rehearse certain aspects of the sights and sounds they encounter on television, just as they do of their real-world experience. They attend selectively to those aspects of programs that they find interesting, entertaining, and comprehensible." A. Houston & J. Wright, The Forms of Television and the Child Viewer, in 2 Pub

Communication and Behavior 105 (G. Comstock ed. 1989).

38/"Dominick's estimate from a sample of 250 10th and 11th graders was 3.5 hours per day (Dominick,,, 1984). B. Greenberg, Mass Media and Adolescents 5 (Sept. 1988) (unpublished manuscript) [hereinafter cited as Mass Media and Adolescents].

39/ ". . . Greenberg et. al. (1986) . . identified 5.43 hours per day across an urban sample of 1100 Black and White 14-16 year olds. . . ." Mass Media and Adolescents, at 5.

In addition, "Brown and her colleagues (Brown, Campbell and Fisher, 1986) reported from a sample of 1200 teens (2/3 white and 1/3 black) that the average number of hours of television viewed each week and had the following pattern: 25 hours for white females, 27 hours for white males, 31 hours for black males and 32 hours for black females. The ethnic difference was statistically significant, but the main point is that the overall levels of television viewing consisted of 3.6 hours per day at the low end and 4.6 at the high end! In a second study of 1800 12-14 year olds, Brown et. al., (1987) found even higher overall viewing levels with whites averaging more than five hours and blacks more than seven hours per day, but also that television viewing declined with age, with the largest drop occurring between 13 and 14 years of age. That drop in TV viewing was offset by increased use of radio in that older age group." Mass Media and Adolescents at 5.

midnight) 99% of teenagers will listen to a radio.[40] Surveys have found that between 27%[41] and 76%[42] listen to the radio every day. In addition, children are selective in their listening habits.[43]

USE OF VIDEO CASSETTE RECORDERS

With the advent of video cassette recorders (VCRs) television has become more pervasive and accessible. VCRs allow children, particularly adolescents, to record a program and view it later. Surveys indicate that the majority of programming taped was

40/ "For example, during a typical Monday-Friday, 99% of the teenagers (12-17) will have listened to a radio sometime between 6 a.m. and midnight. More specifically, a larger accumulation of teenagers (60% of all of them) will have listened to radio sometime between 6 and 10 a.m. on any given weekday than during any other daypart; 48% will be listening between 7 p.m. and midnight and 49% between 3 and 7 p.m., so these are all strong time periods for reaching that audience. In contrast, the later morning period (10 a.m. - 3 p.m.) on week ends will net 63% of the teenage audience. The best single quarter hour begins at 7 a.m., although this strongest listening period stretches from 6: 30 to 7: 45 a.m. There is a second audience bulge after school from 3: 30 - 5: 30 p .m. and a final one from 9-10: 30 p .m. These greater listening periods for teenagers are largely consistent across census regions, county size, in the top 10, 25, 50 and 100 markets, among different size households and different individual levels of daytime, afternoon and evening television viewing. The only substantial deviation occurs when the radio being used is in an automobile, and then the prime drive time is 3-7 p .m. " Mass Media and Adolescents at 34-35.

41/ "Pooling age groups, 27 percent of the total sample reported listening either every day or most days after school, with another significant age trend. . . . Here the change seemed to occur between the third and fourth grades; while only 20 percent of the first through third graders said they listened 'every day' or 'most days', 42 percent of the fourth and fifth graders said so . " "Eavesdropping" at 31.

42/ "Radio proved to be the most prevalent medium, with 76 percent of the K-12 population reporting listening every day or almost every day. " The Wired Bedroom at 3 .

43/ "Children's awareness of and identification with specific stations ought to be an indication of the centrality of radio in their lives. Overall, 69 percent of the sample reported having a favorite station; first and second graders were split 50-50 on this question, while 80 percent of the third through fifth graders reported having a favorite." "Eavesdropping" at 31.

from the broadcast networks.[44] It is important to note that while nationally approximately 64% of all households had a VCR, "75 to 80 percent with children have acquired one."[45]

The introduction of VCRs has inserted a complicating factor into the ordinary equation of preventing children's exposure to indecent and obscene material. The VCR permits even young children to tape a program for viewing at a later time, presumably outside parental supervision.

Within the discussion of regulating indecent material the VCR has the greatest impact on the practical application on the proposed alternative of time channeling. The essence of the technology of video cassette recorders is antithetical to any conceivable workable attempt to channel indecent material to hours when children may not statistically be expected to be in the viewing audience. As noted earlier, between the hours of 11:30 p.m. and 1 a.m., the generally proposed time during which indecent material would be channeled, children between the ages of 2 and 17 watch an average of 17 minutes per week from

44/ About 2/3 of programming taped in VCR households is from network affiliates, Nielsen reported in VCR tracking report. Taping statistics, roughly following normal viewing patterns, are based on Feb. 1989 data. Feature film were most popular programs recorded during the period. Nielsen said remaining 34% of taping was done as follows: Independent TV, 13%; premium cable services, 10%; basic cable, 7%; PBS, 4%." Communications Daily 8 (June 15, 1988).

"Feature films on ABC, CBS and NBC are what get recorded the most; in fact, of all the recording done by VCRs, 66 percent of it is fare that's offered by those networks." "Nuggets from Nielsen", TV Guide 32 (Aug. 26, 1989).

45/ M. Winn, "the VCR: A New and Imported Baby Sitter?" The New York Times, Aug. 27, 1989, p. 29, col. 6.

"More than half the homes in the U.S. now have VCRs (Televisions Information Bureau, 1988). A Boston study (Hughes and Dobrow, 1988) reiterated that homes with children are even more likely to have VCRs (85%). In 1985, Greenberg and Heeter (1987) found VCR penetration in adolescent homes at 33 percent in 1985 in a Michigan urban site, and Greenberg and Lin (1988) found it at 78% in a similar site in 1987." Mass Media and Adolescents at 43.

this 90 minute period.[46]

In its Notice of Inquiry the Commission requested information regarding the age at which children are capable of operating a video cassette recorder. While it is conceivable that there are many precocious preschoolers who may ably operate the VCR, the significant inquiry must reach further. The real harm from access and exposure to indecent television broadcasts is to adolescent and preadolescent children who are searching for material that will address their sexual curiosities. While the long-term impact of such television programs is unknown it is not unreasonable to conclude that early exposure to indecent material is a factor in shaping later behavior as well as viewing patterns.[47] These are the children who have the cognitive ability

[46] The World Almanac and Book of Facts 361 (1988). This figure should be compared with the average of 1:22 hours for viewers over 18.

[47] "... the current results indicate that 14-month-old infants can readily use a two-dimensional depiction of guide their own three-dimensional behavior on the world. In this primitive sense, infants can 'make sense of' the representational medium of television. These findings raise the possibility that exposure to TV in the home may potentially influence infant behavior more than heretofore contemplated." Id. at 1228. More significantly are the results from research concerning adolescents and sexually-oriented broadcast material. A recent research review noted:

> Brown, Childers and Waszak (1988) also provided a synthesis of prior research on television and adolescent sexuality. They found that:
>
> ...media standards of sexual attractiveness can affect how adolescents judge themselves and others.
>
> ...more frequent soap viewers provide higher estimates of the incidence of divorce and illegitimacy in the real world.
>
> ...exposure to sexually explicit content (among college students) results in greater acceptance of promiscuity and sexual infidelity among both males and females.
>
> ...one study demonstrated a positive relationship between early viewing of sex-oriented television fare and the onset of sexual activity among boys, but not among girls.
>
> Working with data from 1100 14-16 year olds in three

(Footnote Continued)

to ascertain the content of late-night programs and to record these programs for viewing at a later time. The combination of video tape recorders and indecent programming is an impossible combination for parents who wish to prevent their children form being fed inaccurate portrayals of sexuality and human behavior.[48]

(Footnote Continued)
urban sites, evenly divided by gender and race. Greenberg et. al. (1987) determined that adolescent Blacks and females had the greatest exposure to television and to televised sex content in particular; in addition, the Black youth had the heaviest diet of R-rated movies. In terms of family structure, adolescents with two original parents did the least TV viewing, least exposure to sex content on TV and saw the fewest R-rated movies.

In a subsequent experiment, exposing (or not exposing) 443 high school teens to videotaped scenes of sexual behavior from commercial broadcast television programs (Greenberg, Linsangan, Soderman and Heeter, 1988), those who saw the scenes (1) acquired significantly more knowledge as to the meaning of specific sex-related language terms, (2) did not alter their beliefs about sexual activities, and (3) rated scenes from different sex content areas quite differently, e.g., the homosexual scenes were least acceptable and least sexy, intercourse scenes or discussions were least funny, and intercourse between unmarried partners was the most realistic. Furthermore, more frequent television viewers judged the sex content more acceptable and found it more enjoyable, and adolescent females, with their strong affinity for soap operas, enjoyed the sexual content the most, save for scenes involving prostitution. Mass Media and Adolescents at 24-25.

[48] Under the currently accepted definition of indecency much of the material that would fall within that category would be sexually explicit, but not legally obscene. Many of the same messages that are found in obscene material are found, in milder forms, in material that is indecent. Consequently, the analysis of its potential for social harm and destruction of normal human behavior is much the same. In The Final Report of the Attorney General's Commission on Pornography 42-47 (1986), Commissioner Dr. Park Dietz made the following observations:

D. Sexual Disinformation

(Footnote Contunued)

The increasing availability and use of the VCR by children of all ages will only increase the amount of time they spend

(Footnote Continued)

Pornography is a medical and public health problem because so much of it teaches false, misleading, and even dangerous information about human sexuality. A person who learned about human sexuality in the "adults only" pornography outlets of America would be a person who had never conceived of a man and woman marrying or even falling in love before having intercourse, who had never conceived of two people making love in privacy without guilt or fear of discovery, who had never conceived of tender foreplay, who had never conceived of vaginal intercourse with ejaculation during intromission, and who had never conceived of procreation as a purpose for sexual union. * * *. If these were the only adverse health consequences of pornography the most straightforward remedy would be to provide factually accurate information on human sexuality to people before they are exposed to pornography, if only we could agree on what that information is, on who should provide it to the children whose parents are incapable of doing so, and on effective and acceptable means by which to ensure that exposure not precede education. In the absence of such a remedy, the probable health consequences in this area alone are sufficient to support recommendations that would reduce the dissemination of that pornography which teaches false, misleading, or dangerous information about human sexuality. And these are not the only adverse health consequences of pornography.

E. Encouraging Social Behavior with Adverse Health Consequences

Pornography is a medical and public health problem because it encourages patterns of social behavior which have adverse health consequences. The person who follows the patterns of social behavior promoted by pornography is a person for whom love, affection, marriage, procreation, and responsibility are absolutely irrelevant to sexual conduct. We do not need research to tell us that such persons on the average contribute more than other persons to rates of illegitimacy, teenage pregnancy, abortion, and sexually transmitted diseases. If these were the only adverse health consequences of pornography, the most

(Footnote Continued)

watching programs that are originally aired after 11 p.m. It then becomes virtually impossible to monitor and intercept such material before it reaches the child. The suggested alternatives of time channeling, parental supervision and pre-program warnings will not have any practical protective effect. Consequently, the only effective avenue available to protect children from exposure to indecent broadcast material is the proposed 24-hour prohibition.

PARENTAL SUPERVISION

As one of the proposed alternatives to the 24-hour proscription, the FCC has suggested that indecent programs be channeled to a time during which it is likely that children will not be in the audience. The feasibility of this alternative, as the FCC noted,

(Footnote Continued)

> straightforward remedy would be to more effectively encourage responsible sexual behavior, if only we knew how. In the absence of such a remedy, the probable health consequences in this area alone are sufficient to support recommendations that would reduce the dissemination of pornography. And these are not the only adverse health consequences of pornography.
>
> F. Fostering Attitudes with Adverse Health Consequences
>
> Pornography is a medical and public health problem because it increases the probability that members of the exposed population will acquire attitudes that are detrimental to the physical and mental health of both those exposed and those around them. The social science evidence adequately demonstrates that even in
>
> (experimental samples of mentally stable male college students, exposure to violent pornography leads to measurable, negative changes in the content of sexual fantasies, attitudes toward women, attitudes toward rape, and aggressive behavior within the experimental setting. Analogous results of exposure to nonsexual media violence have been well-documented for even longer. Although too few experiments have clearly tested the effects of degrading pornography, there are suggestions in the few existing studies that exposure to degrading pornography has negative effects in the experimental setting, including

is premised upon parental supervision and efforts to protect children from such broadcasts. As a viable alternative, parental supervision presents several policy as well as practical difficulties.

The first of these considerations involves the recognition of the duty that parents have to supervise their children's activities as compared with the duty of the broadcaster as a licensee to operate the station "in the public interest".

Without question parents have a duty to protect their children from danger and harm. Included in this is the need to protect them from information of images that are harmful or contrary to the family's moral convictions. Television and radio have become a way of life for most families.

The broadcasters have a duty that serves as the basis for their license. That duty is to serve the public interest. Included in the "public" whose interest is to be served are children and adults

> eliciting anxiety, depression, and hostility. Biographical accounts of individuals go beyond the experimental evidence in attributing changes in male sexual attitudes and demands to pornography, including nonviolent pornography, and in documenting adverse consequences to women and children of the behavior of these men. Some of these accounts include persuasive examples of direct and immediate imitation and of long-term modeling effects. Moreover, the existing population-based evidence for the United States shows a correlation between circulation rates of magazines containing pornography (primarily of a nonviolent type) and rates of reported rape in the fifty states during the same time period, even after many other factors were statistically controlled. In my opinion, we know enough now to be confident in asserting that a population exposed to violent pornography is a population that commits more acts of sexual brutality than it otherwise would and to suggest somewhat less confidently that the same is probably true of a population exposed to degrading pornography. Even if these were the only adverse health consequences of pornography, there would be no straightforward remedies for these consequences short of reducing the exposure of the population to violent and degrading pornography.

who do not wish to b xposed to indecent programming. The question that necessarily arises from the recognition of these two duties is, as a matter of policy and basis for law, which of these duties should be the focus of this regulation. These commentators believe that the weight of public policy and legal precedent is on the side of the parent. Unless the broadcaster properly discharges his duty and refrains from transmitting indecent material an overwhelming percentage of parents will be unable to effectively supervise their children's activities.

The second consideration involves the ability of parents to physically supervise their children's viewing and listening selections.

As a practical matter, there are significant portions of the day during which children are not subject to parental supervision. These include time spent in school or day care, time after school before a parent returns from work and time in the evening when the child is in a different room from the parent.

In 1986, of the 62,763,000 children under eighteen identified, 73.9% lived with both parents. [49] During 1987, of the 24,630,000 households including a married couple with children under eighteen, 63.9% of the wives worked outside the home. [50] This means that on any given weekday, of the 62,763,000 children under eighteen in the United States, approximately 44,387,311 will be either in a home in which the mother works outside the home or they will live in a single parent home with the father or the mother. Consequently, a significant number of parents are not able to monitor their children's listening or viewing habits simply because they are

[49] Statistical Abstract of the United States 1988 No. 69 (108th ed. U.S. Dept. of Commerce Bureau of the Census [hereinafter cited as Statistical Abstract].

[50] Statistical Abstract No. 62 and No. 624

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not physically present for long periods of time. 51/ To place the burden on these parents is not only unreasonable as a matter of policy, it also creates a practical impossibility.

As previously discussed, technological advances have made it likely that children may transport a radio or television set with them wherever they are. Children can be seen with a walkman around their waist or a radio to their ear in most public places.

Table 6 included in the Notice of Inquiry suggests the 58% of the parents placed limits on the type of programs their children could watch and 44% placed limits on the number of hours the children could watch television.52/ A recent survey discussed the factors involved in whether children were subject to rules regarding television use. The study found that in homes in which there was more than one television set or in which the child had possession of the set it was less likely that there would be rules for viewing. 53/

When children and parents are in the home and the parents are

51/ In recent research, "Stanley (1986) extensively examined family structure variables and their relationship to adolescent television viewing among 1100 14-16 year olds. She found more total television viewing, more primetime, more soaps and more TV during dinner in one-parent as compared with two-parent households; TV viewing was stronger in households with only a mother present, and in all households that did not have two original parents. More viewing occurred in homes where the mother was not home during the day, although Brown et. al. (1987) did not find this relationship with maternal employment, and Lawrence, Tasker, Daly, Orhiel and Wozniak (1986) found the opposite relationship – maximum time with TV among adolescents whose mothers were fulltime homemakers, intermediate levels of viewing among those whose mothers were employed part time, and minimal among those whose mothers worked fulltime. However, Lawrence's adolescents were all from two-parent, two-child families in a deep southern state. Finally, if the adolescent was the oldest child or the only child, there was significantly less TV watching." Mass Media and Adolescents at 7.

52/ A 1988 study indicated "that parental mediation of television viewing for teens is largely non-existent in terms of limits on television viewing, control over particular program choices and the presence of any kind of television viewing rules. Mass Media and Adolescents at 5.

53/ "Thus, households with less than full-time employed, or less educated parents would be more likely to formulate viewing rules. * * * Therefore, viewing rules tend to be less common in homes with more television sets and

(Footnote Continued)

available to supervise the viewing or listening habits, the question is whether such supervision actually takes place or whether it may be possible to supervise the listening or viewing habits of the child. A recent study examined the coviewing habits of parents and children. The researchers found:

In general, parents, did not engage in extensive coviewing of family series with their children. On average, parents and second graders coviewed 5.60 primetime and 1.96 syndicated series ever in the last year. The corresponding figures for sixth graders were 7.12 and 2.05, while for tenth graders they were 7.63 and 2.80. Fewer series were coviewed frequently. Parents and second graders coviewed 1.91 primetime and 0.42 syndicated series at least a couple times a month. The corresponding figures for sixth graders were 3.31 and 0.72, while for tenth graders they were 3.37 and 0.94. For all series and for primetime series only, the mean coviewing frequency was between something less that "just a few times this year" and "have watched [together], but not in last year." Thus considering everything that could be viewed and the amount of time parents and children probably spend viewing, few series were coviewed and small proportion of viewing time was spent together.54/

The conclusions of this study may be under representative of the supervision and influence parents wield. This survey was conducted with respect to the coviewing of programs that would be considered "family series". It is reasonable to conclude that the coviewing number would be less for series containing profanity and sexual situations. The reasons for coviewing appear to be more a similarity in entertainment tastes rather than using the television as a learning device. With this in mind, the

child-owned media: Parental Mediation and Rulemaking for Adolescent Use of Television and VCRs, 33 J. for Broadcasting & Electronic Media 53, 61, (1989) hereinafter cited as Parental Mediation Rulemaking]

54 A. Dorr, P. Kovaric, and C. Doubleday, Parent-Child Coviewing of Television, 33 J. of Broadcasting & Electronic Media 35, 45 (1989) [hereinafter cited as Parent-Child coviewing]

impact of parental supervision or coviewing is suspect. 55/

The question of parental supervision also must assess the parents' ability to supervise the use of VCRs since they are a factor in television viewing. In a recent study researchers concluded that several factors were important in mediating a child's viewing habits and VCR use. The study found:

Though employment is not predictive of mediation, the inverse correlation is perhaps a function of the reduced time that working parents can devote toward rulemaking. Alternatively, homes with fewer parents or single parents were actually more likely to suggest viewing rules, contrary to our assumption that more parents imply greater guidance. Some of these parents may feel a sense of regret about not being able to supervise their child's viewing and hence felt compelled to regulate such action.56/

The study also found that the greater the child's access to a

55/ "The absence of any relationship between parent-child coviewing and children's social reality judgments needs explanation. One possibility is simply that coviewing has little impact on social reality judgments. Its primary importance would be in providing an opportunity for parents to promote evaluation of the realism of television's message, but such promotion would need to be measured directly in order to show an effect on perceived realism. Given the earlier findings on reality comments and judgments (McLeod et. al., 1978; Messaris & Kerr, 1934), it is still somewhat surprising that coviewing is explicitly measured, then, there is no way to decide what accounts for the absence of relationship in our data.

"Our findings provide a glimpse of parent-child coviewing patterns, their attitudes correlates among parents, and their consequences for children. They show that parents coview with children, particularly when their viewing preferences coincide, and that coviewing is associated with generally positive parental attitudes toward television and specific beliefs in encouragement for children learning from television. They do not, however, suggest that coviewing is very much motivated by an active determination to mediate children's television experiences. Coviewing occurs least often with younger children who need mediation most. At all ages, coviewing increases children's use of family series to learn about human relationships, but it has little impact on children's other beliefs about and reactions to television." Parent-Child Coviewing at 49.

television set or VCR the less likely it would be for parents to mediate their use or to establish rules. 57/

With respect to attempts to mediate the use of radios, they would most certainly be futile. It is unheard of that a family listens to the radio together as a form of structured entertainment. The only situations in which the parents an children are together to listen to the radio take place in an automoblle.58/

In any circumstance, the prevalence of profanity and sexual innuendo on television and radio makes it virtually impossible for parents to be adequately forewarned of indecent material. 59/ When parents wish to permit their children to view television and even when they watch the program with the children, the family is still bombarded with repeated incidents of profanity

[56] Parental Mediation and Rulemaking at 64.

[57] "The media environment also plays a role in predicting rulemaking for television viewing and VRC-use. For instance, that child access to media is a significant predictor of less rulemaking for both television as well as VCR use suggests that children who are allowed to own a personal television set, record player, etc., have parents with more liberal attitudes toward parental guidance. In line with that logic, children engaged in more solitary viewing (due to ownership of personal sets or working parents) are also predictive of fewer television viewing and VCR-use rules. On the other hand, children who make more recordings of various television programs also received a greater level of mediation. Since families typically have only one VCR, time-shifting activity would require coordination among family members. Parents would therefore be engaged in regulating time-shifting related playback scheduling to a greater extent." Parental Mediation and Rulemaking at 64.

In expressing the exasperation of a real family setting when attempting to supervise viewing, Mrs. Terry Rakolta stated, "They say in every household there are an average of 2.8 television sets. We have three. I would have to be Florence Joyner to get to every TV set and monitor it and turn it off." T. Rakolta, Larry K tve (CNN, Mar. 7, 1989).

[58] This was the se of the father and son which gave rise to the Pacifica case. Even the most aggressive of parental mediation is not sufficient to protect the child from such assaults.

[59] During the period from April 27, 1989 to May 24, 1989, several thousand volunteers monitored primetime network television programming. These individuals coded for incidents of sex (either actual or by innuendo), profanity and violence. This survey found that there were an average of almost eight incidents of sex an profanity per hour per network. [There was

(Footenote Continued)

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and sexual conduct. 60/

The frequency of profanity and sexual innuendo recorded by these surveys does not take into account the incidents of profanity and sexual innuendo that occur outside of primetime network programming. The use of VCRs and the variety of non-network broadcast stations make such material more readily available to children.

Even when at home, parents can not always be in the same room. Parenting is challenging and demanding enough, without putting this extra burden on the parent. The burden should be placed on the broadcaster to exercise restraint on a 24-hour basis, not on already harried parents who are making an effort to protect their children from harmful material.

RATINGS AND WARNINGS

This alternative would require a warning to be announced prior to the broadcast of a program with arguably indecent material. In addition to the abrogation of the doctrine that the broadcasters are licensed to serve the public interest, which does not involve the broadcast of indecent or obscene material, there are several other problems with such an alternative.

The most significant problem with the application of such an alternative is that viewers or listeners tune in and out of radio and television programs frequently. Therefore, a warning that was broadcast at the beginning of the program would be of no value

a total of 23.84 incidents of sex or profanity per hour on television. The actual numbers by network however, were: NBC – 9.34; ABC – 6.14; and CBS – 8.36.]

[60] Current statistics reveal that children between the ages of 2 and 17 watch an average of 5.80 hours of primetime television per week. Assuming the the average number of incidents of profanity and sexual innuendo is approximately 8.0 per hour, this translates into the average child viewing over 46 incidents of profanity and sexual conduct per week during the primetime-hours.

Of the movies rated by the MPAA that were shown on broadcast television in the past two years, 27.6% were "R" rated. See, Appendix One. Appendix Two contains a list of recent movies shown on broadcast television and the rating of each.

to a listener or viewer who tuned into a program after it had begun.

The concept of a warning as a protective measure or reasonable alternative to a 24-hour proscription is completely contrary to all current data identifying the number of television viewers who are grazers. There are several significant characteristics of grazers that should be considered. First, grazers tend to be younger viewers. 61/ This means that these habits are established at a younger age and will likely continue throughout the viewer's lifetime. "Grazing is only likely to grow. While viewers age 50 or over exhibit much more traditional patterns of television viewing, those 18 to 34 years old – the demographic most coveted by advertisers – are developing quite a different approach, and there is no reason to think their behavior will change as they age." 62/

In addition, and more significantly, grazers are more likely to be inadvertently assaulted by indecent material than traditional viewers. When grazers change channels, "[s]ome 39 percent say they flip through all the channels, while more than half say they check out only specific, predetermined channels. Once again, the real difference in behavior is by age. Around half of the 18-to-34-year-olds flip through all the channels, while the majority of 35-and-over viewers tend to flip to predetermined channels. Slightly fewer than half say they find another program and stay with it to the end. But 45 percent say they continue to switch channels. And when we asked viewers what makes them stop grazing, only two answers were given with any frequency: visual impact – something unusual catches their eye – or they see something that is familiar to them." 63/ Additionally many

61/ Channels at 15.
62/ Id.
63/ Id.

grazers change channels frequently within the hour. 64/

It is reasonable to conclude that these grazing habits do not suddenly appear when a viewer becomes 18 years old. These viewing habits, while not specifically documented, are apparently cultivated in children. The limited research that has been conducted has found children graze in much the same manner as their adult counterparts. 65/ In addition children will graze during commercials. 66/ Consequently, millions of children will tune in and out of programs either on their own or through the actions of their parents. If a program contains indecent

64/ "Findings reported in the Channels research are backed up recent findings by R.D. Percy & Co., which reveal an audience heavily into channel changing. On average, Percy's sample of New York City households switched once every three minutes and 42 seconds. Heavy grazers (17.9 percent) switched channels more than once every two minutes; moderate grazers (35.8 percent) changed one to three times every six and a half minutes and light grazers (46.3 percent changed one time every 20 minutes). Those with remotes change more often than those without remotes, those with cable more than those without cable. Higher income viewers tended to switch more frequently than those with lower incomes. During commercials, audience numbers dropped 17 percent, one-third of this number due to people switching to other programming." Channels at 35.

65/ "Gazing through the dial to see what's on and choosing a program is particularly common among younger viewers. According to a 1988 MTV Tracking Study, 50 percent of 12-34 year olds 'flip through channels instead of looking at TV Guide or at newspapers' to find out what to watch. And a Nickelodeon/Yankelovich Youth Monitor of 6-17 year olds found an even larger number – 64 percent – say they 'flip around from channel to channel' to decide what to watch." Channels at 43.

66/ "Some 19 percent of 6-8-year-old children zap commercials, – while 30 percent of older kids, ages 9-11, regularly zap commercials. The ease with which young people graze could have profound long-term implications, says MTV's Cohen, because grazing seems to be spreading as the current media-savvy generation grows up. I believe that once begun, grazing carries with you throughout life,' opines Cohen, who argues that people don't just watch TV anymore; they use it." Id.

material a warning at the outset of the program will do nothing to warn the grazer who tunes in midway through the program. 67/

Third, warnings are totally dependent on the presence of a parent in order for them to be effective. Unfortunately, as Judge Leventhal pointed out in his dissent in Pacifica, 556 F.2d at 34, all too often no parent is present to exercise this supervision and authority. Assuming that every parent does care and is willing to supervise his child's viewing and listening habits, the fact of real life is that a parent cannot be present 24 hours a day in the child's life.

In addition, the whole premise underlying prior warnings is debatable. An analogy to an "attractive nuisance" situation can easily be made: for example, a dangerous work site or gravel pit may be posted with warning signs, yet this is not sufficient to keep young children who cannot read from this terrible danger, and, in fact, the warning signs may even attract these children to the danger. Nothing short of a six-foot fence, with padlock, and warning signs will be sufficient to keep children away. Even then some enterprising children will succeed in entering, but the owner is not held liable for any resulting harm because he has done everything possible. This principle should be carried over to the present situation – nothing short of a 24-hour proscription is sufficient to protect against the harm caused by exposure to indecent material.

An additional problem that would be present from the adoption of this alternative would be an implicit revision of First Amendment law with respect to the concept of consenting adults. The statute currently prohibits the broadcast of indecent

67/ Included as part of this comment is a video tape recording of an arguably indecent program that included a warning. The viewer tuned in after the program had begun and missed the warning.

A textual description of the excerpts is included in Appendix Eight.

and obscene material. In conventional obscenity prosecutions defendants frequently raise a defense of "consenting adults". This argument maintains that the viewers of such obscene material were "consenting adults" and therefore the law should not proscribe its distribution.

If the Commission recognizes the sufficiency of a warning preceding otherwise illegal indecent material, it would in essence be accommodating the defense that so long as individuals were adequately warned as to the potential illegality of the material and chose the view at their own risk, they were consenting to the broadcast of such material. In Paris Adult Theatre I v Slaton, 413 U.S. 49, 57 (1973), the Court specifically rejected the theory that the dissemination of obscene material acquires constitutional immunity simply because it is distributed exclusively to consenting adults. The warning would serve only to notify individuals that indecent material was about to be broadcast — material that would arguably be illegal under current law. The warning does not make the material any less indecent just as the distribution of obscene material to willing adults does not make it any less obscene or illegal.

Material that is indecent is so because of the nature of its content. A warning preceding the broadcast of such material does nothing to alter the nature of the material. If the warning would have any consequence it would be to entice young children and immature adults into viewership. 68/

BROADCAST TECHNOLOGIES AS ALTERNATIVES TO A 24-HOUR PROHIBITION

There is a philosophical problem with the concept of using technology as an alternative to a 24-hour proscription. Assuming

68/ Such warnings would be commensurate to the notices posted outside "Adults Only" pornographic outlets that purport to preclude those under eighteen and to give fair warning to all others who choose to enter as to the nature of the material found inside.

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that there are technological alternatives that would restrict most children's access to indecency – probably a false premise in itself – this approach places the burden on the individual or parent wanting to be left alone in the home. The burden is a matter of economics and time. Obviously, the vast majority of the broadcast receiving equipment in the homes now do not have the suggested technology, necessitating that the concerned parent or objecting adult will need to purchase it. This could be a never-ending process as various forms of technology become obsolete and, as a result, ineffective in restricting a minor's access, thus requiring a new purchase or acquisition.

Further, some of the suggested technology, such as Second Audio Program (SAP) is wholly inadequate as a alternative. The audio portion of a sexually explicit movie could be coded, but the video portion would still be displayed in all vividness.

Finally, some of the suggested alternatives, such as lock-boxes or parental discretion units, are overly broad. They limit access to the radio or television, or to entire television channels, which prohibits the viewing of all programming, decent and indecent. This alternative places the burden on the consumer rather than upon the licensee thereby thwarting the intent of the legislative scheme in requiring broadcast licensees to operate in the public interest.

AVAILABILITY OF NON-BROADCAST ALTERNATIVES

Assuming that there is a significant number of adults in America that crave indecent material, the question then becomes whether there are sufficient alternatives for them to access this type of material. This concern emanates from the Supreme Court's decision in Butler v Michigan, 352 U.S. 380 (1957). In Butler the Court found that a statute prohibiting the distribution of any material that was harmful to minors "reduce[d] the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the

individual, now enshrined in the Due Process Clause of the Fourteenth Amendment. . . ." 352 U.S. at 384. The facts underlying the present broadcast regulatory scheme are sufficiently dissimilar from the Michigan statute so as to render the Court's decision in Butler inapplicable. The 24-hour prohibition against broadcast indecency affects only a small portion of the sexually explicit material available to adults.

The issue of alternative sources of indecent material was clearly decided in Pacifica. The Court found that adults had the option of purchasing tapes or records, or going to theaters or nightclubs to hear the "Filthy Words" or other similar material, deemed to be indecent. 438 U.S. at 750 n.28. These same alternatives are available today, with even wider accessibility.

There are several readily available means by which adults who wish to may view indecent material. These include: cable television, satellite television, video cassette tapes, magazines, and theater films.

Most adults have the ability to subscribe to cable television. Currently, 56.4% of the total television households subscribe to cable and 87.3% of TV households have the ability to subscribe. 69/ A substantial percentage of movies shown on premium cable television stations are sexually explicit. 70/ In fact, of the movies receiving a rating from the MPAA and shown over the past 24 months on premium cable stations, 51% were "R" rated. 71/

Satellite dishes designed to receive hundreds of different transmission signals are found connected to many homes. These dishes allow the user to receive transmissions from across the country any time of the day. Many of these transmissions are

69/ "Summary of Broadcasting & Cable", Broadcasting 26 (Jan. 8, 1990).

70/ See, Appendix Four.

71/ See, Appendix Five for more complete data on the number of movies shown on premium cable stations.

sexually explicit in content.

As noted earlier video cassette recorders (VCRs) are found in a majority of homes. 72/ Video cassette tape sale and rental is a multi-billion dollar business. 73/ In a recent survey of adults, "Lin (1988) found that two-thirds preferred watching videos to going out to the movies, and more than half joined a video club." 74/ The cost involved in VCR rental in minimal. Video cassettes may be rented at video rental stores, convenience stores, libraries, and gas stations.

Any adult has the opportunity to subscribe to various sexually explicit magazines. In addition to the indecent or obscene nature of these magazines there are advertisements for video cassette tapes that may be purchased as well as offers for catalogues from which the subscriber may order. 75/ This means that any adult may not only view sexually explicit magazines without ever leaving his home, he may also receive and view video tapes without having to go out.

An adult may also view indecent films at a theater. Many of the films that are released are indecent or otherwise not recommended for children's viewing. 76/

As these media relate to the question of whether there are viable alternatives to radio broadcast indecency, that is exactly

[72] See, supra at 29 n.45.

[73] "Based on calculations from Paul Kagan Associates that the entire home-video industry last year generated $6.4 billion worth of rentals and $1.5 billion in sales, that would work our to a whopping $948 million in the sale and rentals of adult movies." "Sales Down, Problems Up for Adult Home-Video Industry", L.A. Times, Sept. 22, 1989.

[74] Mass Media and Adolescents, at 43.

[75] These magazines contain numerous video tape titles that may be purchased through magazines advertisers. A list of some of the available titles is found in Appendix Three to this comment.

[76] In 1988 62.5% of the 555 movies released were rated "R" by the Motion Picture Association of America. Public Affairs Office, Motion Picture Association of America

what the Pacifica case addressed. The Court concluded that by proscribing indecent broadcasts the government would not be unconstitutionally restricting adults' access to indecent material. The conclusion would be no different today.

IMPACT OF THE PROPOSED REGULATIONS ON THE FAMILY

In 1987 President Reagan signed Executive Order 12606 to "ensure that the autonomy and rights of the family are considered in the formulation and implementation of policies by Executive departments and agencies." 52 Fed. Reg. 34,188 (Sept. 9, 1987). Consequently, in formulation and implementing this rulemaking to proscribe the broadcast of indecent material 24-hours a day, it is essential that the FCC address the specific questions as required by this Executive Order. The Order requires seven different aspects of the impact on the family to be examined.

First, the agency must determine whether the action by the government strengthens or erodes the stability of the family, and, particularly, the marital commitment. The repeated and regular viewing of sexually oriented material interferes significantly with the marital relationship. It breeds discontentment with and unrealistic expectations of the spouse. To permit some indecent broadcasting will only serve to drive a wedge between a husband and wife and disrupt the stability of the marriage.

Second, the agency must determine whether the action strengthens or erodes the authority and rights of parents in the education, nurture, and supervision of their children. The 24-hour prohibition will allow parents to more effectively protect their children from exposure to indecent material. If indecent material is permitted on broadcast radio or television parental authority will be completely undermined. Without a 24-hour proscription parents will be unable to educate and nurture their children as they choose.

Third, the agency must determine whether the action helps the

family perform its functions, or whether the action substitutes governmental activity for the function. The prohibition against broadcast indecent material is a proper governmental function. While some parents may choose to allow their children to view indecent material they will not be limited by this regulation. These parents will still have cable television, video tape cassettes and feature films available to their families. The government is merely providing all parents the opportunity to structure their families in the manner they see fit.

Fourth, the agency must determine whether the action increases or decreases family earnings. These commentators believe that the prohibition against the broadcast of indecent material will not have any significant impact on a family's financial situation.

Fifth, the agency must determine whether the activity can be carried out by a lower level of government or the family itself. The regulation of broadcasting has historically been the exclusive province of the federal government, namely the FCC. Because of this historical context and the present pervasiveness of the broadcast media it is essential that the federal government continue its regulatory scheme. The family is not best suited to address the complex and broad problems presented by the airing of indecent material.

Sixth, the agency must determine the type of message that is sent to the public concerning the status of the family through the implementation of this regulation. The implementation of the 24-hour prohibition would send a clear message to the public that the government respects the family unit. To implement a policy that would do less than completely proscribe indecent material would be to tell the public that the families who choose not to view indecent material are of no real consequence.

Finally, the agency must determine the type of message this action will send to young people concerning the relationship between their behavior, their personal responsibility, and the norms of our society. The implementation of the 24-hour

prohibition will send a clear message to young people that America still has certain standards of acceptable public behavior. There is still a "right" and a "wrong". In addition, through the enforcement of this standard, young people will see that those who choose to ignore the law will be punished. This regulation will teach standards of acceptable behavior and will sérve to instill a sense of responsibility in young people.

These commentators request that the FCC discharge its legal responsibility and analyze the proposed regulation in the terms as set forth in Executive Order 12606. In doing so, these commentators believe that it will conclude that the 24-hour prohibition against the broadcast of indecent material will strengthen the marital and family relationship and will reinforce parental authority.

CONCLUSION

There is ample statistical information to support the finding that broadcast television and radio are pervasive media. The courts have long held that individuals have the right to be free from indecent broadcasts. In its duty to protect children from exposure to indecent material the government is left with only on viable alternative: to prohibit the broadcast of such material 24-hours a day. Children are in the broadcasting audience at all times of the day. In addition, children are capable of recording a program broadcast at a time when they are presumed to be sleeping and played back at a time when they choose.

Indecency is a concept founded in common law nuisance. As such a program that may be considered to be indecent at 2 o'clock in the afternoon may not necessarily be indecent when broadcast at 2 o'clock in the morning. The context in which the program is broadcast and time of day are factors to be considered when deciding whether material is indecent.

As a matter of public policy, the burden of securing the airwaves from indecent material should be borne by the licensees. To place the burden upon the listening or viewing public is to

circumvent the underlying principles of broadcast licensing. Consequently, the Commission should adopt a rule proscribing the broadcast of indecent material 24-hours a day with the support of the evidence submitted in this comment.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of	)
Enforcement of Prohibitions	) MM Docket No. 89-494
Against Broadcast Indecency	)
In 18 U.S.C. Section 1464	)

REPLY COMMENT

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INTRODUCTION

This Reply Comment will address the primary arguments in opposition to a 24-hour prohibition on indecent broadcasts put forth by those submitting Initial Comments in this Inquiry. When appropriate, the Comments will be addressed topically rather than individually.

The starting point in any review of regulations of broadcast material is whether the licensees are operating or intending to further the best interest of the public. In the case of trying to permit unrestrained indecency or indecent material disseminated at broadcaster discretion, the interests of the public are not best served.1/

The Comments received from the broadcasters and others advocating an abolition of indecency standards do not necessarily reflect the concern and judgment of millions of Americans. Millions of Americans are assaulted and left with limited entertainment choices because of the proliferation of broadcast indecency.

These Comments also do not reflect the law as it is today and as it has been historically. In 1934 Congress determined that broadcast obscenity and indecency was prohibited. It has only been through the maneuvering of the Commission in recent years that the possibility of permitting indecent broadcasts has even been entertained. The most recent Congressional action which has led to this rulemaking efforts was the result of a dissatisfaction on the part of the Congress with the Commission's attempts to rewrite federal Commission in recent years that the

1/ The broadcasting industry has suggested that a 24-hour prohibition on the broadcast of indecent material would violate First Amendment prohibitions on the Establishment of a religion. See, n.2, supra. To make such a suggestion is unsupported by any evidence and is an attempt to silence various organizations from participating in this rulemaking process and to discount the evidence presented in support of that organization's position.

possibility of permitting indecent broadcasts has even been entertained. The most recent Congressional action which has led to this rulemaking efforts was the result of a dissatisfaction on the part of the Congress with the Commission's attempts to rewrite federal law through its enforcement policies.

The interests of millions of American families are affected by this Inquiry. These Commentors understand that the Commission has received several thousand letters from individuals who have wished to be heard on this issue. These Commentors suggest that while many of the individuals may have failed to comply with the filing requirements necessary for recognition in this formal proceeding that the information they offer as viewing adults and parents is of tremendous value to this Inquiry and should be considered.

Adults and children who wish to view broadcast television or listen to radio programs without the apprehension that the material to which they may be subject will be indecent support a 24-hour prohibition of broadcast indecency. Parents are being placed in an impossible position when asked to monitor the viewing and listening habits of their children 24-hours a day.

It should be in consideration of the interests of concerned adults and responsible parents that the Commission formulates its policy. Congress has spoken in a manner to reflect the will of the people. It should not be the action of the FCC which thwarts Congressional mandate.

THE DEFINITION OF INDECENCY

As a preliminary matter, many of the Commentors seek to re-open the question of the proper definition of indecency. The attempts to modify the current definition of indecency have taken several forms. Some Commentors wish to apply a variable obscenity standard in its place; some wish

to integrate a community standards concept; others still, wish to have the Commission produce a "laundry list" of words, scenes or acts that are indecent. Each of these requests is inconsistent with generally accepted legal principles and is merely an attempt to thwart the Commission's regulatory scheme and Congress' intent.

The general concept that underlies these challenges to the indecency definition is one of vagueness and overbreadth. While these two concepts are routinely grouped together and spoken of almost as one concept or with an understanding that the concepts are somehow interchangeable, this is not the case.

In Federal Communications Commission v Pacifica Foundation, 438 U.S. 726, 743 (1978), the Court addressed the argument that the definition of indecency was so vague that it would lead broadcasters to unreasonable self-censorship.

> It may be true that the Commission's order may lead some broadcasters to censor themselves. At most, however, the Commission's definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities. While some of these references may be protected, they surely lie at the periphery of First Amendment concern. (cite omitted). The danger dismissed so summarily in Red Lion, in contrast, was that broadcasters would respond to the vagueness of the regulations by refusing to present programs dealing with important social and political controversies. Invalidating any rule on the basis of its hypothetical application to situations not before the Court is "strong medicine" to be applied "sparingly only as a

> last resort." (cite omitted). We decline to administer that medicine to preserve the vigor of patently offensive sexual and excretory speech.

Ten years later these same parties made virtually the same argument before the District of Columbia Circuit Court in Action for Children's Television v Federal Communications Commission, 852 F.2d 1332, 1338-39 (D.C. Cir. 1988). The court stated:

> The generic definition of indecency now employed by the FCC is virtually the same definition the Commission articulated in the order reviewed by the Supreme Court in the Pacifica case. However, the Court did not address specifically, whether the FCC's definition was on its face unconstitutionally vague. The Court did hold the Carlin monologue indecent within the meaning of section 1464. 438 U.S. at 741. We infer from this holding that the Court did not regard the term "indecent" as so vague that persons "of common intelligence must necessarily guess at its meaning and differ as to its application." Connally v General Constr. Co., 269 U.S. 385, 391 (1926). The Court referred to the "normal definition of 'indecent,'" quoted a dictionary definition, and noted that the Commission's definition uses "indecency" to indicate "patent offensiveness." 428 U.S. 740 & nn.14, 15.
>
> Moreover, while observing that Pacifica took issue with the FCC's definition of indecency, the Court quoted elements of the definition with seeming approval: "The

> Commission identified several words that referred to excretory or sexual activities or organs, stated that the repetitive, deliberate use of those words in an afternoon broadcast when children are in the audience was patently offensive, and held that the broadcast was indecent." 438 U.S. at 739. The Court ultimately declared: "When [Pacifica's] construction [that prurient appeal is an essential component of indecent language] is put to one side, there is no basis for disagreeing with the Commission's conclusion that indecent language was used in this broadcast." Id. at 741. In sum, if acceptance of the FCC's generic definition of "indecent" is capable of surviving a vagueness challenge is not implicit in Pacifica, we have misunderstood Higher Authority and welcome correction.

These same parties have returned no more than two years later with this same argument. They have failed to identify the change in circumstances from 1988 or even from 1978 that would necessitate a change in the definition of indecency. Those Commentors who would have the Commission adopt a rule that flies in the face of judicial decision are seeking to place the Commission in an untenable position.

The Commentors assert that the suggested definition of indecency creates an impermissible national standard. Thissame argument was addressed by the Supreme Court in Sable Communications of California, Inc. v Federal Communications Commission, 109 S.Ct. 2829 (1989). The Court stated:

> In its facial challenge to the statute, Sable argues that the legislation creates an impermissible national standard of obscenity, and that it places message senders in a "double bind" by compelling them to tailor all their messages to the least tolerant community.
>
> We do not read sec. 223(b) as contravening the "contemporary community standards" requirement of Miller v California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed. 2d 419 (1973). Section 223(b) no more establishes a "national standard" of obscenity than do federal statutes prohibiting the mailing of obscene materials, 18 U.S.C. sec. 1461, see Hamling v United States, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed. 2d 590 (1974 or the broadcasting of obscene messages, 18 U.S.C sec. 1464, * * *.

109 S.Ct. at 2835.

The suggestion by certain Commentors that the indecency standard by applied on the basis of standards of identifiable local communities demonstrates a lack of understanding of the law underlying the indecency concept and fails to account for the practical impossibility such a suggestion implies. The Court in Pacifica specifically stated that its decision was based upon a nuisance rational. While the nature of the material in question may be akin to obscene material, the legal theory underlying its regulation is somewhat different. It is important to note that material that meets the basic description of indecency may not, in fact, be indecent depending upon factors such as time of day and audience composition.

The nature of indecency law, while borrowing from

the law of obscenity, is based on nuisance law and should be treated as such. Consequently, the definition of indecency will be applied as a nuisance concept rather than a rigid set of criteria more commonly found in other areas of the law.

In addition, some Commentors request that the indecency prohibition apply only to spoken material, excluding visual material. This narrowing of the definition is without foundation and would lead to absurd results. If the Commission adopted this suggestions, it would be powerless to regulate scenes of nudity, simulated intercourse, and depictions of excretory functions if there was no verbal description surrounding such material. Such a result was certainly not the intention of Congress nor does it demonstrate a reasonable approach to the regulation of the broadcast media.

The definition the Commission currently uses has been approved and accepted by the Supreme Court. To venture into uncharted waters with a substantially different definition of indecency would be imprudent and unadvisable.

INTERESTS TO BE PROTECTED

Many of the Commentors seek to narrow the scope of the interests underlying the regulation of indecent material. Some Commentors assert that the only recognizable interest involved in this regulation is that of parental supervision. To further serve the ends it seeks and in a distortion of the concept of parental supervision, Action for Children's Television seeks to define "parental supervision" as any period of time a child is in the presence or under the control of any adult. This would include day care workers, school teachers, baseball coaches, and school bus drivers. To say these individuals stand in the same shoes as a parent demonstrates a gross lack of understanding of the supervisory role of the parent and assumes that the nonparent adults

actually supervise the activities of the child.

In describing the unique nature of parental supervision, the Supreme Court in Wisconsin v Yoder, 406 U.S. 205, 213-14 (1972) stated:

> There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education. See, e.g., Pierce v Society of Sisters, 268 U.S. 510 (1925). Providing public schools ranks at the very apex of the function of a State. Yet even this paramount responsibility was, in Pierce, made to yield to the right of parents to provide an equivalent education in a privately operated system. There the Court held that Oregon's statute compelling attendance in a public school from age eight to age 16 unreasonably interfered with the interest of parents in directing the rearing of their offspring, including their education in church-operated schools. As that case suggests, the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society. See also Ginsberg v New York, 390 U.S. 629, 639 (1968); Meyer v Nebraska, 262 U.S. 390 (1923); cf. Rowan v Post Office Dept., 397 U.S. 728 (1970). Thus, a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interest, such as those specifically protected by the Free Exercise Clause of the First

> Amendment, and the traditional interest of parents with respect to the religious upbringing of their children so long as they, in the words of Pierce, "prepare [them] for additional obligations." 268 U.S., at 535.

The fact that courts recognize the right to parental control supersedes that of the government in compulsory education, illustrates two important points. First, there is a distinction between "adult" supervision such as teachers and school personnel and "parental" supervision even when the matter concerns education. The recognition of this distinction involves the fact that parents must be able to impart a certain value system to their children and that this value system may differ from other adults with whom the child has contact. In such a case, the values of the parent and his ability to impart those values supersedes that of other adults.

Second, the Court in Wisconsin emphasized the specific interest of parental supervision. It was likened to enumerated First Amendment rights such as the Free Exercise Clause. The same type of parental supervision is at stake in the guidance of a child's value system through the ability to shield the child from indecent broadcast material.

Parents are not able to supervise their children at all times, nor should they be expected to shadow their children throughout the home in an effort to protect them from indecent material. Those Commentors who suggest that the burden on parents to supervise the viewing and listening habits of their children are clearly out of touch with the demands already placed on parents to supervise their children.

While parental supervision is a compelling interest and must be afforded the greatest deference, and contrary to the suggestion of some Commentors, there are other interests

at stake concerning the regulation of indecent broadcast material. These interests are fully discussed in these Commentors' Initial Comment and reference should again be made to that discussion.

In attempting to narrow the framework within which the Commission may operate, the broadcasters have virtually eliminated all legally recognized interests that would support a 24-hour prohibition. These interests, as discussed in these Commentors' Initial Comment include, privacy rights and government interest in the welfare of children.

One interest that all Commentors in opposition to the 24-hour proscription failed to bring forth was that of the broadcast licensee to "operate in the public interest." This failure is indicative of the mindset of the broadcasters who offered comments in opposition to the 24-hour prohibition.2/ To the broadcasters, the important factor is editorial control and ratings of the program. Not once did a broadcaster recognize that it was operating by virtue of a licensee granted by the Commission to operate in the public interest. Not once did a broadcaster suggest that the dissemination of indecent material at any time of the

2/ One broadcaster, Bonneville International Corporation, supported the 24-prohibition of such broadcasts. Bonneville did so with great courage and recognition of the responsibilities that licensees have. Because it did so, the broadcasting industry magazine, Broadcasting, made the following comments:

> Although the reply comment period gives another 30 days for the ban backers to show their colors (blinders on a field of blue would be appropriate) -- and there could conceivably be a comment or two waylaid temporarily in an FCC stack-so far, only Bonneville Broadcasting, with strong ties to the Mormon church, and Morality in Media and American Family Association, also powered by strong church influence, have weighed in for the FCC action. That suggests the ban represents the furthering of a religious interest, from which the state is duty bound to maintain its distance." at p. 74 (Feb. 26, 1990).

A copy of the magazine article is attached to this Comment

day was contrary to the public interest. Instead, the broadcasters seek to have the Commission adopt a policy that would reduce the airwaves to a forum that would appeal to the lowest common denominator in society's hierarchy of values. This was certainly never the intent of Congress in granting the FCC the power to license broadcasters and it was not the underlying premise in requiring broadcasters to operate in the public interest that they design programming to appeal to individuals who enjoy offensive and indecent material.

The Commentors opposing the regulation of indecent material also failed to recognize the interest that each individual has to live in a "decent" society. In Paris Adult Theatre I v Slaton, 413 U.S. 49, 59-60 (1973), the Court stated:

> As Mr. Chief Justice Warren stated, there is a 'right of the Nation and of the States to maintain a decent society . . . ,' Jacobellis v Ohio, 378 U.S. 184, 199, 12 L.Ed. 2d 793, 84 S.Ct. 1676 (1964) (dissenting opinion). See Memoirs v Massachusetts, 383 U.S. 413, 457, 16 L.Ed.2d 1, 86 S.Ct. 975 (1966) (Harlan, J. dissenting); Beauharnais v Illinois, 343 U.S. 250, 256-257, 96 L.Ed. 919, 72 S.Ct. 725 (1952); Kovacs v Cooper, 336 U.S. 77, 86-88, 93 L.Ed. 513, 69 S.Ct. 448, 10 ALR2d 608 (1949).

This interest is just as significant, if not more so, in the context of broadcast indecency as it is in the distribution of commercial obscenity. If citizens have an interest in a

decent society when measured against the distribution of obscene material in the open marketplace they likewise have

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an interest in a decent society within the confines of their home against indecent broadcast material.

HARM TO CHILDREN

Several Commentors assert that the lack of any demonstrable causation between viewing indecent material and anti-social behavior on the part of children must result in a lack of regulation on the part of the Commission. A similar argument has been historically made with respect to the regulation of obscene material. In Paris Adult Theatre I, the Court stated:

> But, it is argued, there are no scientific data which conclusively demonstrate that exposure to obscene material adversely affects men and women or their society. It is urged on behalf of the petitioners that, absent such a demonstration, any kind of state regulation is "impermissible." We reject this argument. It is not for us to resolve empirical uncertainties underlying state legislation, save in the exceptional case where that legislation plainly impinges upon rights protected by the Constitution itself. Mr. Justice Brennan, speaking for the Court in Ginsberg v New York, 390 U.S. 629, 642-643, 20 L.Ed.2d 195, 88 S.Ct. 1274 (1968), said: "We do not demand of legislatures 'scientifically certain criteria of legislation.' Noble State Bank v Haskell, 219 U.S 104, 110, [55 L.Ed. 112, 32 S.Ct. 186]." Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature of Georgia could quite reasonably determine

> that such a connection does or might exist. In deciding Roth, this Court implicitly accepted that a legislature could legitimately act on such a conclusion to protect "the social interest in order and morality." Roth v United States, 354 U.S. at 485, 1 L.Ed.2d 1498, quoting Chaplinsky v New Hampshire, 315 U.S. 568, 572, 86 L.Ed. 1031, 62 S.Ct. 766 (1942)(emphasis added in Roth). 413 U.S. at 60-61.

The Court went on to discuss some of the potential harms that may result from exposure to obscene material.

> If we accept the unprovable assumption that a complete education requires certain books, (cite omitted) and the well nigh universal belief that good books, plays, and art lift the spirit, improve the mind, enrich the human personality, and develop character, can we then say that a state legislature may not act on the corollary assumption that commerce in obscene books, or public exhibitions focused on obscene conduct, have a tendency to exert a corrupting and debasing impact leading to antisocial behavior? "Many of these effects may be intangible and indistinct, but they are nonetheless real." American Power & Light Co., supra., at 103, 91 L.Ed. 103. Mr. Justice Cardozo said that all laws in Western civilization are "guided by a robust common sense . . . ." Steward Machine Co. v Davis, 301 U.S. 548, 590, 81 L.Ed. 1279, 57 S.Ct. 883, 109 ALR 1293 (1937). The sum of experience, including that of the past two

> decades, affords an ample basis for legislatures to conclude that a sensitive key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data. 413 U.S. at 63.

In an effort to support its position that exposure to indecent programming presents no harm to children, Action for Children's Television's employed three social scientists to compile a review of the existing literature. Professors Donnerstein,3/ Wilson and Linz prepared the review.

In their review of the literature, ACT's social scientists present three primary questions for consideration. Those questions are: 1) What are the effects of exposure to indecent language?; 2) What are the effects of exposure to song lyrics or poems where references to sexual activity is clear, or songs containing explicit language or sexual references?; and 3) What are the effects

3/While not attempting to create a personality issue, it is important to recognize the potential bias of the researchers conducting the analysis. In State v Cinema Blue, Inc., Mecklenberg County, North Carolina (1989), Professor Donnerstein was called as an expert on behalf of the defendants. Professor Donnerstein's testimony was excluded from trial on the basis that it was more prejudicial than probative for the jury. The fact that some of these researchers have repeatedly been critical of governmental efforts to regulate sexually explicit and obscene material must provide a foundation for an accurate synthesis of their review and analysis of the research on this topic. It would be naive of the Commission to assume the complete objectivity of these researchers in light of their historical alignment with proponents of unregulated distribution of sexually oriented material of all types.

of exposure to movies which include nudity and scenes depicting sexual matters?

In presenting a review of, the scientific literature in response to the first question, Donnerstein, et al. conclude that they "could locate no scientific studies on the effects of children's exposure to indecent language such as concern the FCC." Comments of Action for Children's Television, Et Al, MM Docket No. 89-494 (Feb. 20, 1990)(Review of Social Science Research on the Effects of Sexually Indecent Materials p. 2). The researchers then rely primarily on two studies to support their conclusions.

The conclusion drawn from a review of the Report of the Surgeon General's Workshop on Pornography and Public Health (U.S. Dept. of Health and Human Services 1986) was "the Surgeon General of the United States has recently concluded that sexually explicit materials may have little impact on children because they do not have the cognitive capabilities to comprehend such messages." In fact, the Surgeon General concluded:

> It is important to note first that the effect on children of any particular influence like exposure to pornography is the result of many interacting factors. Most obviously, the effects of exposure are likely to differ depending on the age of the child. Because of new cognitive and social skills that develop as a child matures, the effect that an experience with pornography has at one age does not always correspond to the effect that it has at another. In addition, recently it has become clear that there is considerable variation between children in their proclivities for certain activities or susceptibility to particular influences. Children bring dispositional

> tendencies and early learning patterns into any interaction with the environment, and these may also produce wide variation in the impact that any particular influence or incident has on the child. Finally, exposure to pornography does not occur in a vacuum. Like any other factors that might influence child development, exposure to pornography is unlikely ,to exert an influence totally distinct from the setting and social context in which it is experienced. For example, a short exposure and subsequent discussion with a parent about the factual accuracy or value message of the material would in all likelihood have a quite different effect than repeated solitary exposure. How to test systematically the effects of exposure to pornography in the face of this myriad of potential influences is obviously quite a methodological challenge. Report of the Surgeon General's Workshop on Pornography and Public Health at 5 (U.S. Dept. of Health and Human Services 1986).

In fact, the summary conclusions with respect to the effects of pornographic material on children are less succinct than Donnerstein et al. would have the Commission believe. The Surgeon General discussed at some length the difficulty in quantifying the harm to children and the actual influence such material has on the development of children.4

4. As has been noted throughout this report, because of ethical concerns it is impossible to directly test for effects of pornography on children and adolescents. As a result, research on effects of exposure has been done almostxclusively on college students in late adolescence.

Finally, the reviewers suggest that a child's ability to identify with anatomical correctness various body parts and function is relevant to a determination of the whether exposure to indecent material causes harm. The ability of children, or adults for that matter, to correctly identify body parts and functions has no bearing on that individual's perceptions of sexuality, sexual behavior or language choice. Individuals who rape, sexually assault or demean

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eEstimating the extent to which these effects can be generalized to children and young adolescents is a complex process, requiring interpretation and integration of knowledge regarding child development. This task is beyond the scope of this section, but a few caveats could be helpful. As children mature they develop new cognitive and emotional skills, and their interests shift. As a result of these changes in basic understanding and orientations, the message that an 8- or 12- or 16-year-old would get from a certain pornographic movie may be quite different from that of an 18-year-old. In addition, relationships to family and peers undergo considerable change in the ten years between 8 and 18, meaning that the mediating factors on any effects will also shift during this developmental period. Finally, there is the likelihood of a "cohort effect" interacting with normal patterns of development. Growing up in the 80's is different than growing up in the 60's, and sociohistorical changes can affect the rates of many things from juvenile crime to views of interpersonal relationships.

These simultaneously changing factors make it extremely difficult to predict the exact effects of particular influences on children. Reasonable prediction can really only be done regarding influences that would be so powerful as to exert marked negative or positive effects in spite of shifts in other influences. Repeated physical abuse of a child, for example, could clearly be stated to produce significant negative effects regardless of shifts in other factors in the child's life. It is likely, however, that exposure to pornography is in that vast grey area of influences that will probably not be shown to act so strongly as to be consistently harmful independent of changes in the child and the social situation.

* * *

Speculating about the effects on children less than 12 years of age is even more of a problem. Younger children think in a qualitatively different manner from those on whom research regarding the effects of pornography are done. In addition, the focus of interest may be quite

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women are not necessarily more literate in the area of human sexuality than those law abiding citizens.

To conclude that because a 9-year-old was not able to correctly define the term "uterus", any exposure he may have to indecent material would be without impact boarders on the absurd. The harm that is attributable to a child's exposure to indecent material is not necessarily demonstrable through an increased knowledge of clinical terms associated with sexual activity. Much of the material that may be considered indecent under the definition used by the Commission is not indecent because of the clinical terms that are used, but because of the lack of a scientific discussion of human sexuality.5/ Children are no more well-

(Footenote Continued)
different in those who have not completed the emotional and physical changes that accompany puberty. The fear (of some is that the sexual and emotional patterns to be followed by these children when they are grown will be "imprinted" on them by seeing pornography at a younger age. Others believe that young children are less affected since they do not have the cognitive or emotional capacities needed to comprehend the messages of much pornographic material. Again, though, we really do not know which of these statements is more accurate, and each of them may be accurate for specific individual children. Report of the Surgeon General's Workshop on Pornography and Public Health at 36-37 (U.S. Dept. of Health and Human Services 1986).

5/ For example, broadcasts cited by the Commission in 1987 for violating indecency standards would have virtually no educative value for children who wished to become better informed about human sexuality. Excerpts of those broadcasts are as follows:
Makin' bacon, makin' bacon, makin' bacon, makin' bacon
[inaudible]
A ten-inch cropper with a varicose vein
Makin' bacon is on my mind
Come here baby, make it quick
Kneel down there and suck on my dick
Makin' bacon is on my mind Makin' bacon is on my mind
Turn around baby, let me take you from behind.
Makin' bacon is on my mind
With your blue, blue knickers, you look so neat.

versed in the terms of human sexuality after exposure to indecent material than before because such material lacks an informative basis and is presented only for salacious purposes. Consequently, the reviewers suggest that the accurate measure of the impact of indecent material on children is an increased knowledge of human sexuality. As identified, and as the Commission is well aware, the material that is the subject of complaint alleging violations of the indecency standards would do nothing to further an accurate education of children in the area of human sexuality. As with obscene material, indecent material often presents women as objects of male desire, and does not present an accurate portrait of human sexual relationships. Therefore, the appropriate measure of impact is not an increased awareness of human sexuality since such a portrayal does not exist in the indecent materials to which most children are exposed The second question concerns the effects on children of exposure to sexually explicit language through song lyrics or poems. Donnerstein, et al., rely on two studies to

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Makin' bacon is on my mind.
Get down baby on your hands and knees
Take my danish and give it a squeeze
Makin' bacon is on my mind
Makin' bacon is on my mind
Turn around baby, let me take you from behind
Makin' bacon is on my mind.
• • •
Hey baby, got something to chew
Deep throat, baby, it's good for you
Makin' bacon is on my mind.
• • •

Makin' bacon is on my mind Turn around baby, let me take you from behind Makin' bacon is on my mind. In the Matter of The Regents of The University of California Licensee of KCSB-FM, Santa Barbara, California, 9 FCC Rcd 2d 2703 (1987).

support their conclusion that the research of this question is nonexistent and that the research that does exist demonstrates that exposure to such material is not harmful. The 1987 Rosenbaum and Prinsky study presented the hypothesis that if music influenced the attitudes or behaviors of children, then the children would be able to recite the lyrics of such songs. While the results of the survey demonstrate that the majority of children are unable to recite the lyrics from popular songs, the researchers did make other observations. Specifically, they found:

> Regardless of the evidence that most youths do not understand the words of the tunes they listen to, popular music may have important symbolic meanings for them. Adolescence is a period during which teenagers separate themselves from family and identify more closely with their peers. Rock music facilitates this shift in identification because it is an inextricable part of youth culture and counterculture. It is created by and for youth and functions for teenagers in delineating a rebellious subculture that stands apart from the adult world. As a music form, it has symbolic meaning that may transcend an interpretation of lyrics (Riesman, 1957; Rosenstone, 1969; Frith, 1978; Hebidge, 1979; Martin, 1979; Larson, 1983; Christensen, 1985). Rosenbaum and Prinsky, Sex, Violence and Rock 'n' Roll, 11 Popular Music and Society 79, 80 (1987).

In an analysis of Rosenbaum and Prinsky's work, Jennifer

Norwood of the Parents' Music Resource Center offered the following statements:

> To list songs that the two professors admit are about sex, violence, drug use, satanism, etc. and have the kids describe them as being about love, friendship and growing up tells us that kids are equating sex with love, friendship with drug use and violence with growing up. Recent statistics on teen drug use, pregnancy, crime and suicide support the contention that our children are confusing these themes.

Norwood, Lyrics, Listening and Good Sense, 11 Popular Music and Society 91, 93 (1987).

Greenberg reviewed the literature that addressed the impact of music on adolescents. He stated:

> School delinquent behavior (e.g., fighting, stealing, damaging school property) was positively related to a preference for heavy rock, and this relationship was particularly strong among adolescents in working class families.
>
> This focus on heavy or hard rock was pinpointed by Korzenny, Tanaka, and Rzyttki (1988) who showed a positive relationship among Blacks and Asian Americans between listening to hard rock and more lax attitudes toward drug dealers, stronger beliefs that cocaine should be legalized, that the anti-drug campaign is exaggerated, and personal use of cocaine.

B. Greenberg, Mass Media and Adolescents 29-30 (Sept. 1988).

One additional survey presents some interesting

findings. In a 1987 survey, Leming stated:

> The samples' reported degree of influence of music on their thinking presents another dimension of the salience of music in their lives. Only one third of the sample indicated that music has no influence on their way of thinking. Half of the sample indicated that a song had influenced the way they think about an important topic. While we may conclude, from the self-reports, that music has an influence on adolescent values, it must be recognized that this influence does not occur automatically through the simple process of passive and unselective absorption of the value messages of music – 71% of the sample report rejecting one song's message because it advocated free and casual sexual relations. This would indicate that, in some value areas at least, the values embedded within the music posed no major threat to a community passing on what it values to youth.

Leming, Rock Music and Moral Values, 18 Youth and Society 363, 379 (1987).

Leming went on to state:

> One cannot conclude, however, from the above data and discussion that rock music has no influence on youth. Clearly, there are limitations to the study that must qualify any tentative conclusions. The small sample size [58], the rural backgrounds, and the overall superior academic ability of the subjects make this sample atypical of the peer population at large. * * *.

> Another obvious limitation of this study is that the music used in the study was relatively tame compared with some of the music available. Limiting the songs selected for this study to Top 40 rock resulted in songs that, in order to become popular, must have a certain mainstream approval and, therefore, must be fairly conservative. The trade-off is, however, that one also gets the most pervasive and significant music in the lives of contemporary youth. The most offensive of contemporary music exists largely as an underground subculture; the music is seldom given air play and, as a result, only through the self-selective mechanisms of music magazines, concerts, and word of mouth is the presence and content of this music known.

18 Youth and Society at 380.

From the surveys identified by Donnerstein, et al., and other available research material, several reasonable conclusions may be drawn. First, children are impacted by the types of music they listen to and the messages that music sends. Second, because rock music has historically been a counterculture medium, messages that are indecent and advocate anti-social behavior are even more potent to adolescents who are rebelling from parental influence. Finally, music lyrics are formulated to convey a specific message or feeling. To discount the effectiveness of such attempts is to ignore the economic success that many of the songs have through record sales and concert ticket sales that are closely related to the amount of "air time" a song receives.

The final question concerns the effects of exposure to movies which include nudity and scenes depicting sexual

matters. The research that Donnerstein, et al., cite is not widely published and the Commentors did not make it available as part of the Comment.

In addressing this question, the researchers begin by stating that such research does not exist and then continue to review literature that speaks to a different issue. The issue Donnerstein et al., raise for this alternative discussion is what effects are manifested in minors who are exposed to "less explicit sexual images and references currently found on prime-time television."

As noted in these Commentors' Initial Comment, there is some evidence that repeated exposure to themes and depictions of sexual conduct does negatively effect minors. See, Comment on Notice of Inquiry Submitted on Behalf of American Family Association, et al. p. 31 n.47. The negative effects are manifested in several ways. Among those are the viewers' real life perceptions of women and the roles that women should and do play in society.

In 1984, Professor George Gerbner reported, as part of an ongoing study, the effects of sexism in television. He stated:

> Our own monitoring and studies by others (see "Journal of Communications Articles on Sex in Violence" in the bibliography) show that more explicit and more permissive sexual references (and occasional portrayals) have increased since the mid 70's. However, while television may have become more sexy, it has not become significantly less sexist. The combination of the two trends makes for exploitive sex as a nightly staple of prime time entertainment.
>
> * * *

> The lessons? We have constructed a "Sexism Index" from responses to National Opinion Research Center General Social Surveys that indicate a sexist orientation. These express beliefs that women are not suited to politics, should not work outside the home if their husbands can supportthem, and should take care of running their home but leave running the country to men. Those who subscribed to all these propositions were grouped into demographically matched low, medium, and high television viewing groups. * * *.
>
> The more television viewers watch the more sexist their orientation. In the typical "mainstreaming" fashion, the least sexist groups (young people and those who call themselves liberals) exhibit the greatest difference between heavy and light viewers. Furthermore, while most viewers become more sexist, one group of low-income viewers, the most traditional and sexist as light viewers, approach the television mainstream from the opposite direction: the heavy viewers among them are less sexist than their light viewing counterparts. * * *.

G. Gerbner, Gratuitous Violence and Exploitive Sex: What Are the Lessons?, (Prepared for the Study Committee of the Communications Commission of the National Council of Churches Hearing in New York on September 21, 1984).

The researchers, after answering the three questions they devised and concluding that the existing body of literature supports a conclusion that exposure to indecent material is not harmful to children, discuss the question of

"What is a 'harmful' effect?" Donnerstein et al. state:

> We would contend that there are two elements necessary to establishing a harm effect, one based on a societal judgment about what constitutes harm, and the other based on the reliability and validity of scientific evidence for such harm, however defined by society. Consistent with this approach, other legal analysts have asserted that virtually every legal judgment is composed of a "normative principle" and a "factual premise," and that social science is most useful for establishing the factual basis of a harm claim (Faigman, 1989; Walker & Monahan, 1988).
>
> The first element is really a matter of philosophy and politics, not an empirical question. In the studies we have surveyed, social scientists have examined outcomes that include knowledge gain, belief and value change and self-reported changes in sexual behavior. Some in our society might argue that a gain in information about homosexuality among children in a harmful effect, whereas others may find changes in children's attitudes about certain forms of sexuality, such as greater acceptance of premarital sex to be undesirable. Still others may require a demonstration of actual changes in behavior such as Increased teenage pregnancy following exposure before they are willing to concede a harm effect. Indeed, some people would~ urge that it is desirable for adolescents to gain more information about sexual matters, and accordingly believe that

> increased availability of information about the subject is desirable. In any case, we as social scientists are unwilling and unable to decide which among these possible outcomes represents a harmful or desirable effect.

Comments of Action for Children's Television, Et Al, MM Docket No. 89-494 (Feb. 20, 1990)(Review of Social Science Research on the Effects of Sexually Indecent Materials pp. 7-8).

The essence of this statement is that while increased acceptability of homosexual behavior, premarital or extra-marital sexual behavior or teenage sexual behavior may be unacceptable to some people, those who conduct the research do not identify such results as harmful or negative. Consequently, if research was available and conclusions demonstrated that exposure to indecent material significantly contributed to greater acceptance of homosexual behavior, premarital or extra-marital sexual behavior and teenage sexual behavior, social scientists would not identify such results as "harmful" or "negative." To state that an increase in teenage pregnancy or sexual promiscuity is not harmful to society, much less the teenager or family unit, is to overlook the profound burden teenage pregnancy has on all aspects of our society.6/

6/ One baby in six is born to teenage parents. Since 1955, the percentage of illegitimate births to teenaged mothers has risen from 14.2 % of all births to 48.3 %. Almost half of 1,092,645 pregnancies occur with unmarried teenage mothers ages 15 to 19 (Mosbacker, B. L., "Special report: Teenage pregnancy and school-based clinics, 1986). This rate of pregnancy represents an increase of 230 % since 1968. Americans abort 1.6 million babies every year, with the teenage abortion rate doubling from 1970 to 1984 (Bennett, William, "Sex and the Education of our Children, School based Clinics and other critical issues in Public Education, p. 158-159). The rate of sexually transmitted disease has soared to 33,000 new cases per day or 14 million per year for all age groups

The harms that are most profound involve the ability children and adults have to create and maintain lasting stable relationships, the res,pectful relationship between parents and children and the basic value system children develop. These harms are not easily quantified. If social scientists are unable to acknowledge that an increase in teenage sexual behavior or promiscuous sexual behavior is not harmful then they would be at a complete loss to recognize the harm in a breakdown in family or marital relationships.

The Commentors who suggest that the Commission must demonstrate a causal connection between viewing indecent material and antisocial behavior have created a straw man for the benefit of their position. The argument they present is structured as follows:

> 1. The FCC must demonstrate that exposure to indecent material is harmful to minors.
>
> 2. The FCC must rely on social science evidence that demonstrates this harm.
>
> 3. There is no credible experimental social science evidence that addresses the issue of harm from exposure to indecent material.
>
> 4. The ethics of experimental research precludes study of exposure to indecent material by minors.

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This figure represents an increase of 140 % in the past 20 years. AIDS is now a serious health problem facing the United States.

5. The FCC does not have nor can it obtain reliable social science evidence that exposure to indecent material is harmful to minors.

6. Therefore, the FCC may not proscribe the broadcast of indecent material.

The concept of attempting an experimental evaluation of the harm to children from exposure to indecent material would be difficult, if not impossible, to implement, even if the ethical concerns did not exist. To truly identify the harms children suffer the experiment would have to take a randomly selected group of children at infancy and place half of them in a family setting in which the parents did not watch television, no siblings watched television or any other person with whom the child had regular contact watched television. The other group would be placed in homes in which television was regularly watched (of course to accurately identify the harms all the children and their families would have to watch the same amount of television and the same amount of television programming). The children would then be monitored throughout their childhood through adolescence.

Donnerstein, et al., observe some of the practical limitations on identifying and quantifying harm to children from exposure to indecent material. They state:

> The social scientist can provide information on the second element or "factual" basis of a harm effect, once defined. Here we would be inclined to say that even the meager effects cited above are questionable because of at least two important methodological limitations. First, most of the evidence cited has been correlational in nature, not experimental. Children are asked

about what they watch and then tested for knowledge and values about sex and interpersonal relationships or asked to report on their own sexual practices. Viewing-reports are then correlated with one or several of these outcome variables. Because these findings are correlational, it is impossible to make causal inferences from these studies. We cannot determine if exposure to sexual conduct causes changes in attitudes or if prior attitudes about sex lead children to select certain types of material for viewing and listening. What would be more compelling is evidence from a controlled experiment. In such a study children would be randomly assigned to either an experimental viewing/listening group or to a control group. there have been few such studies, however. One prominent researcher in this field has commented on this issue, explaining that:

> The dilemma for the researcher is that of taking (sexual) content and presenting it in an experimental setting to viewers who are minors, or those who are under 16 and presumably not entitled to attend R-rated movies without a parent/adult. It is difficult to propose experimental research designs that would permit adequate examination of this readily available content which depend upon parental consent for the

> subject pool. In addition, there is the equal concern as to whether such an experimental treatment can be presented with adequate safeguards, i.e., what is an appropriate debriefing? (Greenberg et al., pp.60-61)

> Thus, this area of inquiry will, in our estimation, always be severely limited by the quality of the evidence that can be collected.

Comments of Action for Children's Television, Et Al, MM Docket No. 89-494 (Feb. 20, 1990)(Review of Social Science Research on the Effects of Sexually Indecent Materials pp.8-9.

The harms that are associated with watching repeated acts of implied sexual intercourse and hearing hours of profanity and sexual innuendo do not occur overnight. There are some television programs that will have a profound and immediate effect on some people, 7/ but the more serious concern is over the long-term effect of repeated and constant exposure to indecent material.

The harms that are most profound involve the ability children and adults have to create and maintain lasting stable relationships, the respectful relationship between parents and children and the basic value system children develop.

In their presentation prepared for Action for Children's Television's Comment, Donnerstein, Wilson and Linz state:

> As we have noted, sexual innuendo or veiled

7/ For example, the instances of violence that occurred after the broadcast of the television movie "The Burning Bed"

> references to sex may have little impact on a younger child who is unlikely to understand the meaning of such verbal references. In contrast, older children who are more likely to understand the references are also likely to have developed moral judgments that would mediate any effects. In other words, the older children may behave in a manner similar to the 18 year-olds in the studies cited above and show no effects.

Comments of Action for Children's Television, Et Al, MM Docket No. 89-494 (Feb. 20, 1990)(Review of Social Science Research on the Effects of Sexually Indecent Materials pp. 11-12).

These conclusions have several flaws. The reviewers assume that the older child did not grow up watching indecent material and was only exposed to it after he had developed the necessary moral bases to guard against any negative effects. As a practical matter this is not the case. Children are born into television and it becomes one of the permanent items in their lives.8/ Its impact is

8/ From the perspective of many mothers and fathers, television has become a more influential educator about sexuality than teachers, ministers, physicians, or relatives. Parents even think that television is more important than peer communication is affecting their children's learning about sexuality. In a report of parent-child communication about sexuality (Roberts et al. 1978), about 50 percent of the 1,400 mothers and fathers interviewed stated that they thought their child learned most about sexuality from television.

This view was especially evident among parents who were themselves the highest viewers of television. A "high viewer" was defined as watching between 27-35 hours a week. These high viewers were frequently younger and had less formal education than "low viewers." Despite this overwhelming recognition of television's impact on their children's

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indisputable and to suggest that children are either too young

to be affected by indecent material or old enough to have a firm moral foundation.to ward off the negative effects is unrealistic.

As a legal matter the courts have never required reliance on scientific evidence (social science or otherwise) in establishing various governmental regulations. See, Kaplan v California, 413 U.S. 115, 120 (1973), in which the Supreme Court stated, "States need not wait until behavioral experts or educators can provide empirical data before enacting controls of commerce in obscene materials unprotected by the First Amendment of by a constitutional right to privacy." If government bodies were required to

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sexual learning, most parents had little faith in the accuracy or reliability of television's sexual content. Again, a far greater proportion of high television viewing parents than low viewers said they believed television to be an accurate source of information about sexuality for their child (Roberts 1980).

In families where one or both parents watched a lot of television, viewing was commonly a family event, and there was some suggestion that parents who watched a lot of television were less likely to talk with their child about sexuality (Roberts 1980). However, so few parents discuss sexual issues with their child that it is difficult to measure the relative importance of television viewing in this process. * * * Thus, as television consumes family interaction time, it limits opportunities for the child to learn from the parent. In addition, parents who viewed a lot of television were more likely (than low-viewing parents) to believe that sexual issues should not be discussed outside the family, in all likelihood further reducing their child's access to alternative sources of information and insight about sexuality (Roberts 1980).

wait until harm from an activity was established to a

scientific certainty, there would be no government-supported school lunch programs (based upon the premise that children learn better when they have eaten a healthful meal); there would be no ability of states to enact mandatory seat belt laws, motorcycle helmet laws or child restraint laws (based upon the premise that they serve to reduce the number of traffic fatalities); and there would be no ability to require warning labels on packages of cigarettes (based upon the premise that cigarette smoking causes lung cancer and low birth weight). Governments may use the common sense of their constituency and themselves to support legislative actions in addition to the body of evidence available.

In addition, it would seem that a prudent government would not allow its children to be harmed irreparably before it took action to prevent such harm. There will never be data produced to satisfy to a scientific certainty that exposure to indecent material is harmful to minors. This does not, however, preclude reasonable measures taken to protect those children from harms that are otherwise recognizable.

Attached as Appendix One for the Commission's consideration and used with permission are the documented clinical findings of Dr. Victor Cline of the University of Utah. Dr. Cline has extensive real-life experiences with the harms to children from exposure to pornographic and indecent material. Specifically relevant to this Inquiry are Dr. Cline's findings with respect to children's behaviors after exposure to dial-a-porn messages. The material received from a recorded dial-a-porn message is similar to a message broadcast through the radio and arguably of less impact than a message both seen and heard through the television.

SAFE HARBOR ALTERNATIVE

Several Commentors recommend that the Commission adopt a "safe harbor" regulation in response to indecent broadcasting. The safe harbor suggestion requires an

allotment of some time during the day in which indecent material may be broadcast. There are several false premises underlying this concept.

First, this concept ignores the licensing requirement that the broadcaster operate in the public interest. This means not only offering programing that the community wishes to hear,9/ but attempting to broadcast in a manner that will benefit the overall community.

Second, contrary to the assertion of some Commentors, the safe harbor provision was not mandated by the Supreme Court in Pacifica. An accurate reading of that decision and the underlying legal concepts demonstrate that such a requirement would be inconsistent with the Pacifica Court's ruling. Since the Court relied on a nuisance concept to uphold the Commission's actions, time of day was a factor in determining whether broadcast material was indecent. It did not state that material could not be found to be indecent after midnight or that the Commission was required to provide a time of day during which indecent material may be broadcast. A proper understanding and interpretation of nuisance law would allow the Commission to enforce a 24-hour prohibition of indecent material and at the same time permit some material to be broadcast during late night hours that it would not permit to be broadcast during prime time or afternoon hours.

Third, contrary to the assertion of some Commentors, the safe harbor provision does not "[c]hannel[ ] indecent material

9/ If providing individuals, or some segment of the population with material they wish to hear, then broadcasters would be airing the locations of the nearest drug dealers to expedite such transactions, the location and operation of the local house of prostitution and various methods that may be used to seduce and abuse children. All of these activities are ones that significant portions of the population engage in on a regular basis.

to times of the day when parents have an opportunity to supervise their children [and] give[ ] parents who do not want their children to be exposed to indecent broadcasts a meaningful opportunity to ensure that their children will not have access to them." 10/ It is unreasonable to believe in "common sense" light and statistically unsupported that by moving all indecent broadcasts to after midnight, children will be protected from such material.

Fourth, the safe harbor recommendation does not assert that no children will be in the listening or viewing audience, but only that a statistically small number of children will be exposed at any given time. The philosophy that these Commentors is asking the Commission to adopt is that it is all right to harm a few hundred thousand children each day. The question ultimately becomes what is the cutoff point for the number of children that can be harmed by exposure to indecent material in any given day. If the Commission adopts a safe harbor provision it is, in essence, declaring that it is appropriate to harm a few hundred thousand children in an effort to ensure that a limited number of adults are able to have free access to indecent material. If for no other reason than this, the concept of a safe harbor must be rejected as unconscionable.

Fifth, the Comments fail to accurately recognize the Court's decision in Pacifica. The FCC's prior attempts to rewrite the decision and the broadcaster's efforts to assist do not alter the fact that the concern for children in the audience was but one of several factors the Court specifically identified. These other factors, the right of privacy in the home and the right to be free from unwarranted intrusion by such material must also be considered. Since adults have

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10/ Comments of Action for Children's Television, Et Al, MM Docket No. 89-494, p. 21 (Feb. 20, 1990).

rights recognized in Pacifica a safe harbor would not adequately protect them. The Court did not qualify those rights nor suggest that they were somehow of lesser value than those concerned with protecting children. Consequently, any regulation adopted by the Commission must recognize the full rights of adults who do not wish to be assaulted by indecent broadcast material.

Sixth, the safe harbor provision would be a practical impossibility. As noted earlier, children are in the listening and viewing audiences at all times of the day. In addition, children have the ability to operate a video tape recording machine and may record material while they sleep for viewing at a later time. Contrary to the broadcasters' suggestion that the FCC affirmative demonstrate that children are listening at specific times of the day, it is sufficient that reliable statistical information supports such a conclusion.

Finally, prior Commission policy does not impair its action in the present action from prohibiting indecent material 24-hours each day. If for no other reason than the current Inquiry is the result of new Congressional action. The issue has been reexamined by the Congress and legislation was modified accordingly. Therefore, any previous policies that would be inconsistent with the current 24-hour proscription are irrelevant.

ALTERNATIVE FORMS OF INDECENT MATERIAL

Several Commentors suggest that the Commission's inquiry into the alternative availability of indecent material was constitutionally irrelevant. In the same breath, however, these Commentors suggest that the Supreme Court's decision in Butler v Michigan, 352 U.S. 380 (1957), precludes the FCC from prohibiting broadcast indecency 24-hours a day.

A clear understanding of Butler is essential to recognize the relevance of recognizing available alternate sources of indecent material. In Butler the state of

Michigan enacted an ordinance that prohibited the dissemination of any "book, , magazine, newspaper, writing, pamphlet, ballad, printed paper, print, picture, drawing, photograph, publication or other thing . . . tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth . . . ." 532 U.S. at 381. The Court concluded, "We have before us legislation not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children." 532 U.S. at 383-84. Consequently, the state sought to prohibit the dissemination of any indecent material anywhere within the state.

The prohibition against broadcast indecency is not analogous to the circumstances in Butler. The Commission is regulating only one form of communication: broadcast material. It is not attempting to proscribe the dissemination of indecent material nationwide or on a variety of media. It is not even attempting to regulate all forms of indecent material that the majority of Americans have available to them on their television sets through cable and satellite connections.

The availability of a wide variety of other forms of indecent material is critical to the analysis of the constitutionality of the indecency prohibition. Consequently, the easy access to indecent material by willing adults and the limited application of the indecency prohibition make the Court's decision in Butler inapplicable.

There can be no question that indecent materials abound in our society. A willing individual may access indecent material through a telephone call, a magazine subscription, video tape recording, motion pictures, or books. The individual may even obtain many of these materials at no cost through the local library.

It is inconceivable that even moderately well-educated adults would assert that their free uninhibited access

to indecent material through broadcast radio and television is more important to the social fabric of this nation than the welfare of the children when there is even the potential for harm to these children from exposure to such material. A review of the comments submitted in opposition to the 24-hour prohibition clearly indicate that this is the position that is being presented. For the Commission to agree to such a standard and adopt this position would be irresponsible and without moral or legal foundation.

CONCLUSION

The Comments received by the Commission from broadcasters and similar interests reflects a genuine abrogation of the licensing requirement that broadcasters "operate in the public interest". For all practical purposes, broadcasters have been left to their editorial discretion in recent years. It has been during this time that Congress has called for a clear 24-hour prohibition.

It is reasonable to conclude, therefore, that this method of self-policing did not and does not work. Adults and children alike, have the right to free from indecent broadcast material. It is only through a total prohibition of broadcast indecency will the interests of the public be adequately served.

There is no constitutional impediment to the 24-hour prohibition against indecent material. The prohibition is narrowly tailored to address the problem that has been identified. Specifically to protect children from exposure to indecent material and as established in Pacifica to protect adults in the privacy of their homes.

It is not sufficient to tell millions of Americans who are offended and injured by indecent broadcasts to turn the dial. This action would leave control of the public airwaves in the hands of a few individuals who had no desire to operate in the public interest. Contrary to the assertions of the

broadcasters and supporters of indecent broadcasting, the government is under no obligation, Constitutional or otherwise, to provide free and unrestrained access to indecent materials through broadcast radio and television.

The government regulates indecent speech in many arenas. Lawyers and litigants may be held in contempt of court for using indecent speech during official proceedings and children may be punished in schools if they use indecent speech in some contexts. The government, through the Federal Communications Commission, is not required to license broadcasters to disseminate indecent material. Such a policy and action would be contrary to the interests of the American public would endanger our children and the overall fabric of our society.

Respectfully submitted,

Peggy Coleman
Legal Counsel

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Enforcement of	)	
Prohibitions Against	)	M M Docket No. 89-494
Broadcast Indecency	)	
in 18 U.S.C. §1464	)	

Comments

Morality in Media, Inc., hereby submits its **COMMENTS** in response to the Commission's Notice of Inquiry, FCC 89-307, Released November 20, 1989. These **COMMENTS** are filed pursuant to Sections 1.415 and 1.419 of the Commission's Rules. Morality in Media is an interfaith, nonprofit charitable corporation organized in 1968 for the purpose of combating the distribution obscene materials in the United States. This organization is national in scope and maintains its headquarters at 475 Riverside Drive, New York, New York 10115.

Morality in Media appeared as Amicus Curiae in Action For Children's Television et al. v. Federal Communications Commission, 852 F.2d 1332 (D.C. Cir. 1988). It had previously submitted Comments in the Commission proceeding below which was then under review. Morality in Media also appeared as Amicus in support of the FCC in Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726 (1978).

POINT I

THE COMMISSION MUST ASSERT THAT GOVERNMENTAL INTERESTS OTHER THAN PROTECTION OF MINORS JUSTIFY THE STATUTORY PROHIBITION ON BROADCAST INDECENCY

A. Laws Against Indecency Have Never Been Thought Of As Protecting Only Or Even Primarily Children

1. The concept of "indecent" is inextricably linked to that which offends societal standards of propriety, modesty and morality and has never been based solely or primarily on what is appropriate for minors. In rejecting a vagueness challenge to 18 U.S.C. 1461, the Supreme Court in Roth v. United States, 354 U.S. 476, at 491, n.28 (1954) stated:

> This Court, as early as 1896, said of the federal obscenity statute: ...Every one who uses the mails. . .must take notice of what. . . is meant by decency...in social life.[emphasis supplied]

2. In Manual Enterprises, Inc. v. Day, 370 U.S. 478, at 482 (1962), Justice Harlan equated "indecency" with the concept of "patent offensiveness" and made it clear that both concepts involve application of community standards:

> These magazines cannot be deemed so offensive on their face as to affront current community standards of decency – a quality

that we shall hereafter refer to as a patent offensiveness or indecency.

> The words of §1461, obscene, lewd, lascivious, indecent, filthy or vile connote something that is portrayed in a manner so offensive as to make it unacceptable under current community mores. ... [T] he statute reaches only indecent material.... [emphasis supplied]

3. In FCC v. Pacifica Foundation, 438 U.S. 726, 740 (1978), the Supreme Court stated that the "normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality."1 The Pacifica Court then quoted from Webster's New International Dictionary (3rd ed. 1966), at 438 U.S. 740, n. 14:

> Webster defines the term as "a. Altogether unbecoming: contrary to what the nature of things or what circumstances would dictate as right or expected or appropriate: Hardly suitable: unseemingly...b. not conforming to generally accepted standards of morality....

4. In Bethel School District No. 403 v. Fraser, 478 U.S. 675, at 682 (1986), the Supreme Court noted that members of Congress were prohibited from using "indecent language against

1. Morality in Media continues to point out that the Commission's definition of what is indecent is too narrow. The United States Supreme Court in FCC v. Pacifica Foundation did not put non plus ultra boundaries on how the concept of "indecency" is used in 18 U.S.C. 1464. Cf., Carlin Communications' Inc. v. FCC, 837 F.2d 546, at 559 (2nd Cir. 1988)("The

(Footenote Continuted)

the proceedings of the House' and asked whether it can 'be that what is proscribed in the halls of Congress is beyond the reach of schools to regulate?" The Court then stated at 478 U.S. 683:

> [S]chools must teach by example the shared values of a civilized social order. ...The schools may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct....
>
> The pervasive sexual innuendo in [the student's] speech was plainly offensive to both teachers and students – indeed to any mature person. [emphasis supplied]

5. The concept of "patent offensiveness" (or "indecency") can be defined with reference to a class more limited than the community at large. In Ginsberg v. New York, 390 U .S. 629 (1968) the United States Supreme Court said that the State has the power to adjust the definition of obscenity as applied to minors and upheld a New York statute which defined "Harmful to minors to mean, in part, that quality of any description or representation when it:

> "is patently offensive to prevailing standards

(Footenote Continued)

Pacifica Court declined to endorse the Commission's definition of what was indecent.). The Pacifica Court started out by defining and giving us the outer perimeters of indecency as "non-conformance with accepted standards of morality. Then the Court decided (as it was required to do) only the issue presented to it, which was whether Carlin's filthy words monologue was "indecent" within the meaning of Section 1464 "as broadcast."

> in the adult community as a whole with respect to what is suitable for minors...." [emphasis supplied]

6. The Congressional prohibition on broadcast indecency, however, is not based on a "harmful to minors" standard. Unlike the standard upheld in Ginsberg, supra, which is specifically aimed at protecting minors from material harmful to them, the 'indecent" standard upheld in FCC v. Pacifica, is an "Indecent For All" standard and is determined for a mixed audience of both children and adults.

B. The Authority Of Congress To Prohibit Indecent Broadcast Is Found In Its Power To Keep The Channels Of Commerce Free Of That Which Harms The Public Morals

7. Section 29 of the Radio Act of 1927 is the source of the current federal prohibition on broadcast indecency found in 18 U.S.C. 1464. Section 29 provided in part:

> "No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication.

8. In Duncan v United States, 48 F.2d 128 (9th Cir. 1931), cert. den., 283 U.S. 863 (1931), the Ninth Circuit upheld this Congressional prohibition against appellant's contention that Congress had no police power to prohibit use of obscene or indecent language in interstate commerce. In so holding, the Ninth Circuit compared the prohibition of the broadcast of obscene or indecent language to the federal prohibition on the mailing of obscene matter and noted at 48 F.2d 130 that the Supreme Court had previously upheld

Congressional authority to refuse its facilities for the distribution of matter deemed injurious to the public morals:

> [T]he Supreme Court considered the extent of this grant
> to the congress... in Re Jackson, 96 U.S. 727.... In the opinion upholding the power of Congress, written by r. Justice Field, it is said:
>
> > In excluding various articles from the mail, the object of Congress has...been...to refuse its facilities distributing of matter deemed injurious to the public morals. Thus,...Congress declared "that no obscene, lewd, or lascivious book...or other publication of an indecent character...shall be carried in the mail...." [emphasis supplied]

9. In Gagliardo v. United States, 366 F.2d 720 (1966), the Ninth Circuit upheld 18 U.S.C. 1464 against appellant's contention that Congress was attempting to exercise Police Power reserved to the states.n In rejecting this argument, the Court of Appeals stated at 366 F.2d 722:

> It is well established that Congress has the power under the Commerce Clause...to—impose penal sanctions on what it considers to be morally objectionable conduct so long as the activity so is 'commerce which concerns more states than one' and has a real and substantial relation to the national interest.

[emphasis supplied] 2/

10. The United States Supreme Court in FCC v. Pacifica Foundation, 438 U.S. at 745-746, also recognized the moral harms associated with broadcast indecency:

> The question in this case is whether a broadcast of patently offensive words dealing with sex and excretion may be regulated because of content. Obscene materials have been denied the protection of the First Amendment because their content is so o~fensive to contemporary moral standards. Roth v. United States, 354 U.S. 476. ...These words offend for the same reasons that obscenity offends. ...[S]uch utterances are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality 3/ [emphasis supplied]

2. The Gagliardo court also disagreed with appellant's argument that obscene and indecent as used in 1464 are synonymous. Id. at 725, n.7. The court noted that the government had asked it to define "indecent" as ~including extremely vulgar, coarse, and offensive use of sexual terminology in a manner far exceeding the bounds of common decency. Id. at 725.

3. That public morality is a proper governmental concern ought to be beyond question. See, e.g., Berman v. Parker, 348 U.S. 26, at 33 (1964) (Public safety, public health, morality, peace and quiet, law and order -- these are some of the traditional applications of the police powers....); Bowers v. Hardwick, 106 S.Ct. 2841, at 2846 (1986) ("The law...is constantly based on notions of morality....").

C. The Public Exhibition Of Non-Obscene But Sexually Explicit Offensive Depictions May Be Prohibited By Reason Of The Obtrusiveness Of Such Exhibitions Or As A Form Of Public Nuisance

11. In Redrup v. New York, 386 U.S. 767 (1967), the Supreme Court reversed the judgments of three State Courts which had found certain publications obscene. The Supreme Court held that the publications were not obscene, noting that in none of the cases was there:

> "a claim that the statute...reflected a...concern for juveniles...[nor] was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling . Cf. Breard v. Alexandria . . ." Redrup at 769. 4/ [emphasis supplied]

12. In Close v. Lederele, 424 F.2d 988 (1970), cert. den., 400 U.S. 903 (1970), the First Circuit Court of Appeals, citing Redrup v. New York, upheld the right of the University of Massachusetts to require an art instructor to remove paintings from the corridor in the Student Union. The corridor was a passageway regularly "used by the public including children," and several of the paintings were nudes, male or female, displaying the genitalia in what was described as "clinical detail." See also Piarowski v. Illinois Community College, 759 F.2d 625 (7th Cir. 1985), cert. den.,

4. See also cases cited in Miller v. California, 413 U.S. 15, at 18-19 (1973). In general, the determination of whether a work is obscene has nothing to do with where the material is disseminated. See e.g., Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); United States v. Orito, 413 U.S. 139 (1973).

474 U.S. 1007 (1985).

13. The 1970 President's Commission on Obscenity and Pornography Report, while foolishly recommending that obscenity laws be repealed, did recommend laws "prohibiting public displays of sexually explicit pictorial materials, based on its finding that "certain explicit sexual materials are capable of causing considerable offense to numerous Americans when thrust upon them without their consent.~ See The Report of the Commission on Obscenity and Pornography, p. 60, U.S. Government Printing Office 1970. The Commission Report included a model "Public Displays of Explicit Sexual Materials law which did not require that the material appeal to the prurient interest or that it be patently ofensive. 'Works of art,' however, were exempted.5/

14. In Erznoznik v. City of Jacksonville, 422 U.S. 20; (1975), the Supreme Court invalidated a nuisance ordinance making it unlawful for drive-in theatres to exhibit films showing nudity if the screen was visible from a public street or place. The city attempted to support the ordinance as an exercise of its police power to, inter alia, "protect its citizens againstunwilling exposure to materials that may be offensive." In rejecting this justification, Mr. Justice Powell,

5. In effect, therefore, the Commission added a "serious value" requirement. It does not require a fertile Imagination to forsee a "work of art" which very well might properly be displayed in a privately owned art gallery but which would not be appropriately displayed on a downtown street corner. Several States have adopted similar display laws. See, e.g., New York Penal law §245.11 Texas Penal Code §43.24(b)(2), Missouri Code S573.060, and Idaho Code §18-4105. New York's "Public Display of Offensive Sexual Material" Statute does not contain an exemption for "artistic works" but does contain a "prurient interest" requirement. People v. Lou Bern Broadway, Inc., 325 N.Y.S. 2d 806 (NYC Crim. Ct. 1971), aff'd, 342 N.Y.S. 2d 78 (N.Y. Sup. Ct. App. Div. 1972), rev'd, 345 N.Y.S. 2d 1012 (N.Y. Ct. App. 1973) illustrates the inadequacy of the "prurient interest" approach.

who delivered the opinion of the Court, stated at 422 U.S. 211-12:

> The Jacksonville ordinance discriminates among movies on the basis of content. Its effect is to deter drive-in theatres from showing movies containing any nudity, however innocent or even educational. ...[W]e conclude that the limited privacy interest of persons on the public streets cannot justify this censorship of otherwise protected speech.... [emphasis supplied]

15. The Court's holding in Erznoznik, however, should not be read as forbidding all restrictions on "expressive nudity" even on publ ic streets. The Court in Erznoznik found that the ordinance was not "directed against sexually explicit nudity" nor "otherwise limited," and that it "sweepingly forb[ade] display of all films containing any uncovered buttocks or breast, irrespective of context or pervasiveness...[including] a film containing a picture of a baby's buttocks, the nude body of a war victim, or scenes from a culture in which nudity is indigenous." Id. at 213. In striking down the Jacksonville ordinance, the Court cannot therefore be said to have also decided the question of whether, for example, an ordinance prohibiting the display or exhibition of patently offensive depictions of nudity or sexual conduct in retail store display windows can constitutionally be applied to a retail video store which begins showing so-called "X-rated" movies on large TV screens in its large sidewalk display windows (or perhaps on the sidewalk) after 12 midnight, when only a few enterprising youth are presumably on the still busy city streets.

16. In Gluck v. Los Angeles, 155 Cal. Rptr. 435 (Cal.

Ct. App. 1979), the California Court of Appeal upheld a Los Angeles "news rack" ordinance to protect persons from unwilling exposure to explicit sexual materials which ~have as their purpose or effect sexual arousal, gratification or affront. In so doing the Gluck Court carefully and properly distinguished the Erznoznik decision. See also, Upper Midwest Booksellers v. City of Minneapolis, 780 F.2d 1389, at 1392-1394 (8th Cir. 1985) (concluding that Erznoznik's "whole work" requirement did not prevent the city from regulating cover displays of harmful to minors material); and Carey v. Population Service International, 431 U.S. 678, at 717 (1977) (Stevens, J., concurring) (A picture which may appropriately be included in an instruction book may be excluded from a billboard).

17. Mr. Paul J. McGeady, in an article entitled "Obscenity Law and the Supreme Court,"6/ explains why matter which can be excluded from a billboard or a display window fronting a busy public street should also be excluded from a medium which transmits its communications indiscriminately into the privacy of virtually every American home:

> Literally, the quality of lack of serious value which obscenity must have means that even where you have pruriency (appeal to lust) and patently offensive "hard-core" sexual conduct specifically defined, it is legal to publish it or present it if the work has serious value. Let us now apply that [serious value] concept to a form of media like television (in

6. McGeady, Paul. J., "Obscenity Law And The Supreme Court," in Where Do You Draw The Line, pp. 102-103 (V. Cline, ed. 1974).

color). Does not the Supreme Court's Miller] opinion say that you can present explicit hard-core sex or bestiality on T.V. if the "play" or "film" or "live performance" has literary or artistic value? It would appear that most Americans, obviously would not tolerate this. ...[T]hey would not tolerate the concept that they must switch the dial to avoid such performances on T.V. or radio or that they must be concerned that their minor children may be exposed to the same.

[I]t is quite obvious that different standards must be applied to T.V., radio.... Television and radio communications certainly partake of the nature of a public access thoroughfare (albeit an electromagnetic one), and what may be prohibited on the public street should be equally prohibited on T.V. and radio. This includes undoubtedly all soft-core or hard-core sexual, explicit conduct as well as nudity. These programs come into the home, and under the doctrine of Breard v. Alexandria, 341 U.S. 622 (1951), the usual broad play afforded free speech may be curtailed. ...The new definition of obscenity cannot be practically or feasibly extended to radio or T.V. in its present form. ...Just as a citizen is entitled to walk down the public street without the necessity of having to avert his eyes to avoid a public nude performance, so too he is entitled to "flip the dial" without viewing intrusive nudity or explicit hard-core sex.

D. The Supreme Court Has Repeatedly Recognized The Important Government Interest In Protecting All Citizens From Unwanted Intrsions Into The Privacy of Their Homes

18. As Mr. Justice Powell noted in Erznoznik v. City of Jacksonville, the Supreme Court has upheld "selective restrictions when the speaker ~intrudes upon the privacy of the home. Id. at 209. The Supreme Court in FCC v. Pacifica Foundation later distinguished its holding in Erznoznik on this very basis. Pacifica at 749, n. 27. Justice Powell, concurring in Pacifica, agreed at 438 U.S. 759-760:

> A second difference, not without relevance, is that broadcasting...comes directly into the home, the one place where people ordinarily have the right not to be assaulted by uninvited and offensive sights and sounds. Erznoznik v. City of Jacksonville... ...Although the First Amendment may require unwilling adults to absorb the first blow of offensive but protected speech when they are in public before they turn away, see, e.g., Erznoznik..., a different order of values obtains in the home. ...This is not to say...that the Commission has an unrestricted license to decide what speech, protected in other media, may be banned from the airwaves in order to protect unwilling adults from unwilling exposure to it in their homes. ...But...[the Commission's] judgment is entitled to respect.

19. The Commission does mention in its Notice of Inquiry, FCC 89-307, released 11/20/89, at p. 6, n. 10, that

> An alternative theory for regulating broadcast indecency is to protect the public's right to be free from indecent material in the privacy of their homes. In Pacifica, the Supreme Court stated that "[p]atently offensive indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First amendment rights of an intruder." 438 U.S. 726, 7478,...; id. at 759-60 (Powell, J., concurring in part).

20. This "alternative theory" was also noted by the Court of Appeals for the District of Columbia Circuit in Action For Children's Television v. FCC, 855 F.2d 1332, at 1344, n. 20 (1989):

> The Pacifica Court also identified an interest in protecting the adult listener from intrusion, in the form of offensive broadcast materials, into the privacy o~ the home. 438 U.S. at 748-749...; see also id. at 759-60... (Powell, J.,concurring). Neither the Reconsideration Order nor the underlying rulings relies on that rationale, however.

21. But in Frisby v. Schultz, 56 L.W. 4785 (6/27/88), the Supreme Court described this "alternative theory" and "interest" in protecting the well-being, tranquility, and privacy of the home as being "certainly of the highest order in a free and civilized society." Id. at 4788. The Court then stated:

> One important aspect of residential privacy is protection of the unwilling listener. Although in many locations we expect individuals simply to avoid speech they do no want to hear..., the home is different. ...[A] special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom. See, e.g., FCC v. Pacifica Foundation , 438 U.S. 726, 748-749 (1978) (offensive radio broadcasts); id., at 759-760 (Powell, J., concurring in part and concurring in judgment) (same); Rowan, supra (offensive mailings); Kovacs v. Cooper, 336 U.S. 77, 86-87 (1949) (sound trucks). [emphasis supplied]

22. In Ward v. Rock Against Racism, 57 LW 4879, at 4883 (6/22/89), the Court again indicated that individual privacy is entitled to greater protection in the home:

7. The Commission's Notice of Inquiry shows the large numbers of adults that "tune-in " to the broadcast media at all hours. Table 3 in Appendix B of the Notice shows that 39.4% of women and 45.5 of men over 18 listen to the radio between midnight and 6:00 AM. [The Arbitron Radio Market Report For New York, Summer 1989, page 286, shows that an average of 4,493,400 persons 18 years of age and older in the New York City Metro Survey Area "tune in to a radio station" each week for at least 5 minutes from Midnight to 6 AM.] Table 2 in Appendix B of the Notice shows that between 20.8 and 53.5 million **people** are watching TV between the hours of 1:00 a.m. and 1:30 a.m and that between 9.9 and 25.6 million **people** are watching between 2:30 a.m. and 3:00 a.m. [The Nielsen Report on Television 1989, page 4, shows that of the 232.8 million **people** in TV households, 77% are adults.]

> This interest [in protecting its citizens from unwelcome noise] is perhaps at its greatest when government seeks to protect '"the well-being, tranquility, and privacy the home."' Frisby v. Schultz...." [emphasis supplied]

23. In a much earlier case, Breard v. Alexandria, 341 U.S. 622 (1951), the Supreme Court upheld a nuisance ordinance aimed at curbing any "uninvited intrusion into the privacy of th[e] home" caused by door-to-door solicitors. The Court's preface to its decision there could well serve as a preface to a Commission Order here:

> All declare for liberty and proceed to disagree among themselves as to its true meaning. There is equal unanimity that opportunists...cannot be permitted to arm themselves with an acceptable principle, such as that of...a free press, and proceed to smooth their path by crushing the living rights of others to privacy and repose. This case calls for an adjustment of constitutional rights.... Id. at 625-626.8/

E. "Helms Amendment" Didn't Transform a Statute Intended To Protect All Americans Into A Statute Intended To Protect Only Children

24. When Senator Helms introduced his rider to the appropriations bill [Cong. Rec. S9911-9913 (daily ed. July

8/ In Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969), the Supreme Court said:

> "It is the right of the viewers and listeners, not the right of the broadcasters which is paramount." [emphasis supplied]

26, 1988)], he made it clear that both 18 U.S.C. 1464 and his amendment were intended to protect ALL Americans from broadcast indecency:

> Mr. President, the purpose of this amendment – and it ought not to be necessary, but it is necessary – is simply to direct the FCC to enforce the law, period.
>
> . . .
>
> —
>
> In 1934, Congress enacted a law...prohibiting the broadcast of indecent or obscene material on radio and television.
>
> It is apparent from the legislative history of this statute that Congress enacted this law to protect the American people, especially children from the psychological ravages of pornography.
>
> I applaud the action that Congress took then. As the leader of the free world, we are charged with the responsibility of promoting the common good and defending decent, moral values upon which this nation is founded. Without a foundation grounded on moral precepts, Mr. President, this nation is going to crumble.
>
> ....
>
> The Supreme Court has long recognized the importance of protecting particularly our children from such indecent material as this.
>
> ....
>
> But a child's access to radio and

television is only one of many reasons to ban indecent material. Mr. President, some people still find this stuff offensive. The reasons are quite clear. Television and radio are the most pervasive...means of communication in our society. Television and radios have permeated every aspect of American society. Indecent material comes directly into our homes, into our living rooms and assaults the millions of Americans who still find this filth repugnant.

Critics say, "Well, just turn off the radio...or turn off the TV...."

Mr. President, as Supreme Court Justice Stevens stated, "that's like saying that the remedy for an assault is to run after the first blow."

So, Mr. President, what is the result of allowing indecent material to be broadcast, even if it is only late at night? Well, it offends those Americans who abhor this type of indecent material. It leaves negative impressions on the minds of our children. ...It corrupts our children and denigrates the moral fabric of society. [emphasis supplied]

F. The Supreme Court's Sable Decision Did Not Limit

Government Regulation of Indecency To That Necessary For The Protection of Minors

25. In Sable Communications of California, Inc. v. FCC, 57 LW 4920 (1989) (Hereinafter, "Sable"), the sole issue, as framed by the parties themselves, was whether a total ban on what the parties considered a form of protected expression – to wit, indecent commercial telephone messages – could be justified solely on a protection of minors rationale.9/ In the Court's judgment, the Sable case presented it with "legislation not reasonably restricted to the evil with which IT is said to deal." Id. at 4923. [emphasis supplied]

26. In distinguishing the context of dial-in services from that of the broadcast medium, however, the Sable Court was careful to note that the Government's regulation of broadcast indecency furthered two valid government interests: (1) protecting adult listeners and viewers from indecent broadcasting which "can intrude on the privacy of the home without prior warning as to program content" and (2) protecting children. Nowhere did Sable abrogate or disavow Pacifica's interest in protecting unwilling adults from invasive, offensive broadcast materials. On the

9. In Sable, the United States Department of Justice, the FCC and Sable Communications of California, Inc. all approached 47 U.S.C. 223(b)'s prohibition on indecent messages from a protected speech rationale. The question of whether indecent commercial telephone messages are protected by the First Amendment was never raised by the parties. The Supreme Court's statement in Sable that "Sexual expression which is indecent but not obscene is protected by the First Amendment" was not essential to the case's determination is therefore obiter dictum. See, e.g. Lehman v. Nakshian, 453 U.S. 156, 165 (1981) ("The language relied on...is dicta, since the parties in that case agreed to a trial by the court sitting without a jury...and the jury trial issue was not directly before the Court.").

contrary, of Pacifica the Sable Court said at 57 LW 4923:

> The Pacifica opinion also relied on the "unique" attributes of broadcasting, noting that broadcasting is "uniquely pervasive," can intrude on the privacy of the home without prior warning as to program content, and is "uniquely accessible to children...." The private commercial telephone communications at issue here are substantially different from the public radio broadcasting at issue in Pacifica. ...There is no "captive audience" problem here; callers will generally not be unwilling listeners. The context of dial-in services...is manifestly different from a situation in which a listener does not want the received message. Placing a phone call is not the same as turning on a radio and being taken by surprise. ...[T]he message received by one who places a call to a dial-a-porn service is not so invasive or surprising that it prevents an unwilling listener from avoiding exposure to it.

27. While the Sable Court does not specifically mention the word "adults" in its discussion of Pacifica, it is clear that the concern is not children. Discussion of willing versus unwilling listeners and of invasiveness makes little sense if the subject of concern is children. Laws intended to protect children from material "harmful to them" apply irrespective of whether the child is "willing" and irrespective of whether the material is disseminated to them inside the home or outside.

POINT II

A MAN'S HOME IS HIS CASTLE, NOT AN AFTER – HOURS HANGOUT FOR THE BROADCAST PIG

28. Nowhere in Pacifica did the Supreme Court10/ limit the Commission's regulatory power over broadcast indecency to "time channeling" and nowhere did it require the Commission to find a timeof day when the broadcast pig can enter the American home. The Court did not even hold that the particular Carlin monologue at issue could be broadcast later in the day:

> "[W] hether broadcast audiences in the late evening hours contain so few children that playing this monologue would be permissible is an issue neither the Commission nor this Court has decided." Id. at 750, n. 28.

29. The Pacifica Court did note that Commissioners Robinson and Hooks had filed a concurring opinion in which they stated that the Carlin Monologue if broadcast "at an appropriate hour" was:

10. In Marks v. United States, 430 U.S. 188 (1977), the Supreme Court said that the three judge plurality opinion in Memoirs v. Massachusetts, 383 U.S. 413 (1966) constituted the holding of the Court and provided the governing standards," since it was the plurality opinion in Memoirs which constituted "the position taken by those members who concurred in the judgment on the narrowest grounds." The Supreme Court has generally regarded the narrowest ground as the rationale offered in support of the result that would affect and control the fewest cases in the future. Cf. City of Lakewood v. Plain Dealer Publishing Co., 56 LW 4611, at 4615, n.9 (6/17/88). The Pacifica Court reviewed only the Commission's holding that the monologue was indecent "as broadcast."

> "distinguished by surfficient literary value to avoid being 'indecent' within the meaning of the statute." Id. at 732, n.6

30. The Pacifica Court also noted that the Commission itself had "suggested" that:

> "If an offensive broadcast had literary, artistic, political or scientific value...it might not be indecent in the late evening.... Id. at 732, n. 5. [emphasis supplied] 11/

31. The Pacifica Court further noted that the Commission's decision rested on a "nuisance rationale under which context is all important" and that the time of day "was emphasized by the Commission." Id. at 750. [emphasis supplied] The Pacifica Court then stated that the nuisance concept:

> ...requires consideration of a host of variables. The content of the program in which the language is used...and differences between radio, television, and perhaps closed-circuit transmissions, may also be relevant. As Mr. Justice Sutherland wrote, a "nuisance may be the right thing in the wrong place – like a pig in a parlor instead of the barnyard. Id. at 750.

11. In its Public Notice, FCC 87-153 (Released April 29, 1987), the Commission did not say that it would take serious value into consideration when the number of children in the audience is reduced to a minimum to determine whether the program is "indecent" within the meaning of 18 U.S.C. 1464. No, without authority in the Law, the Commission said that "indecent broadcasts could be made when there is not a reasonable risk that children may be in the audience." Id. at 2. [emphasis supplied]

[emphasis supplied]

32. The Supreme Court quite clearly recognized, then, that the nuisance concept requires consideration of many variables, including medium and place, and is by no means limited to consideration of "the time of day." "Time of day" is, of course, a "variable" which should be considered in determining whether a particular broadcast is "indecent" within the meaning of 18 U.S.C. 1464. Nudity or sexual or excretory activities or organs depicted or described in a manner which is "plainly offensive" can be expected to have a greater impact upon and potential or harm to the young. Society's interest in regulating indecent broadcast is therefore heightened at times of day when large numbers of children are in the audience.

33 . Further, the " indecency" standard is an "Indecent For All" standard, which includes persons of all ages. In Pinkus v. United States, 436 U.S. 293 (1978), the Supreme Court reversed an obscenity conviction on account of a jury charge which permitted children to be considered. The Court explained that "It may well be that a jury...striving to define the relevant community of persons, the 'average person,'...would reach a much lower ' average,' when children are part of the equation...." Id. at 298. [emphasis supplied] The Court then said, however:

> There was no evidence that children were the intended recipients of the materials at issue here or that petitioner had reason to know children were likely to receive the materials. Indeed, an affirmative representation was made that children were not involved in this case. Id. at 298. [emphasis supplied]

34. There can be little question that during the daytime and evening hours, children and youth are particularly "likely to receive" broadcast programs and can therefore be included in the calculation of what is "indecent" within the meaning of 18 U.S.C. 1464. Matter that is "indecent" if broadcast during the daytime and evening hours, however, when children are most likely to be in the audience, might not be "indecent" within the meaning of 18 U.S.C. 1464 if broadcast at 2 a.m., when the vast majority of children are sleeping.

35. Time of day or serious value, however, cannot make every nonobscene description or depiction of sexual or excretory activities or organs acceptable for broadcast. While the sight of a naked man fleeing from his burning home may be appropriate for broadcast on a late-evening news program, the spectacle of a late-hours talk show guest defecating "on stage" to show his displeasure with American foreign policy or of the show's host and her guests having a "contest" to see who can expel his or her urine the farthest would not be appropriate broadcast material at any time. Similarly, while a nude scene in a highly-acclaimed film may not be patently offensive as measured by contemporary community standards for the broadcast medium if broadcast in the late hours, scenes depicting graphic virulent sodomy or in-color actual copulations, masturbation, fellatio, cunnilingus or bestiality would be patently offensive and "indecent" no matter what the broadcast hour.

36. Indecency in the broadcast medium, contrary to what some claim, is not merely "milder stuff." The FCC definition of "indecent" encompasses liverecorded depictions of "hard-core" sex acts and excretory activities which are undoubtedly patently offensive as measured by any community standard. To determine if programming is

obscene, it would also be necessary to view the program "as a whole" to determine if it appeals to the prurient interest and lacks serious value. If the program were not obscene, uninvited "performers" would be legally permitted to intrude uninvitedly into the living room of every American home after 10:00 p.m. or the Midnight Hour -- masturbating, copulating, flagellating, defecating, etc. in living color.

37. The American people will not stand for this ,and in Pacifica, the Supreme Court recognized that a parlor is a wrong place for a pig and did not say that the broadcast pig can intrude into the homes of millions of late evening and night-time listeners and viewers simply because most children are sleeping.

POINT III

THE COMMISSION IS UNDER NO OBLIGATION TO DEMONSTRATE THAT A TOTAL BAN ON BROADCAST INDECENCY IS A "PRECISELY DRAWN MEANS 0F SERVING A COMPELLING STATE INTEREST"

A. Pacifica Did Not Require The FCC To Show That The Prohibition On Broadcast Indecency Is A "Precisely Drawn Means Of Servi}ng A Compelling State Interest"

38. In Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530 (1980), the Supreme Court invalidated a New York State Public Service Commission order which prohibited public utilities from including bill inserts discussing controversial issues of public policy. The Court considered "three theories" that might have justified the Commission order: (i) time, place and manner regulation, (ii) permissible subject-matter regulation, and (iii) narrowly

tailored means of serving a compelling state interest. The Court concluded that the prohibition was not "content neutral" and therefore could not be upheld as a time, place and manner regulation. The Court concluded that the analysis of cases upholding subject-matter distinctions was also not applicable to the Commission's regulation of bill inserts. The Court in Consolidated Edison then proceeded to determine whether the prohibition was a "precisely drawn means of serving a compelling state interest." Id. at 540.

39. The Court in Consolidated Edison stated, however, that regulation "based on subject-matter has been approved in narrow circumstances" and then said in a footnote at 447 U.S 538, n. 5:

> For example , when courts are asked to determine whether a species of speech is covered by the First Amendment, they must look to the contents of expression. See Central Hudson Gas & Electronic Corp. v. Public Service Commission...(commercial speech); Gertz v. Robert Welch,Inc....(libel); Miller v. California...(obscenity); Chaplinsky v. New Hampshire...("fighting" words). Compare FCC v. Pacifica Foundation...., and Young v. American Mini Theatres, Inc (indecent speech). [emphasis supplied]

40. The Court in Consolidated Edison Co. v. Public Service Commission clearly indicated, therefore, that the question in F.C.C. v. Pacifica Foundation was not whether the prohibition on broadcast indecency was a "precisely drawn means of serving a compelling state interest" but rather whether it was a "permissible subject matter regulation." More specifically, the Court indicated that in

F.C.C. v. Pacifica Foundation, it had addressed the question "whether [Broadcast indecency] is covered by the First Amendment."

41. Nowhere did the Pacifica Court say that the Commission must f inde a time of day when indecent broadcast could be aired. Nor did Pacifica subject the Commission's holding to the "critical scrutiny" it demanded in First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), decided the same year as Pacifica but involving speech which the Bellotti Court described as "at the heart of First Amendment protection." Bellotti at 776. In Bellotti, the Supreme Court stated at 435 U.S. 784-786:

> In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue...especially where, as here, the legislature's suppression of speech suggests an attempt to give one side of a debatable question an advantage in expressing its views to the people....
>
> The constitutionality of [this] prohibition...turns on whether it can survive the exacting scrutiny necessitated by a state-imposed restriction of "freedom of speech. Especially where, as here, a prohibition is directed at speech itself, and the speech is intimately related to the process of governing, "the State may prevail only upon showing a subordinating interest which is compelling"... ...Even then the State must employ means "closely drawn to avoid unnecessary

abridgement...."

42. But in Pacifica the Court concluded that the Commission had not violated its duty to "remain neutral in the market place of ideas," as the state had done in Bellotti. Pacifica, at 746, n. 21. Pacifica stated that the Commission had characterized the Carlin monologue as "offensive" not because of it political content or its point of view but rather because of the "way in which it was expressed." Id. at 746, n. 22. The words used in the Carlin monologue, said Pacifica:

> "offend for the same reasons obscenity offends and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Id. at 746.

43. Pacifica also reiterated that "each medium of expression presents special First Amendment Problems" and that it is broadcasting that "has received the most limited First Amendment protection." Id. at 748. The Court concluded that two attributes of the broadcast media justified "special treatment" of it: it has established a pervasive

12. Cf. California v. LaRue, 409 U.S. 109, 118 (1972) ("bacchanalian revelries" in bars not the "constitutional equivalent" of ballet troupe in theatre). Subsequent Court decisions have also recognized that "~not all speech is of equal First Amendment importance." Hustler Magazine, Inc. v. Falwell, 56 L.W. 4180, 4182 (2/24/88). See Dun & Bradstree, Inc. v. Greenmoss Builders, Inc., 472 U.S.479, at 761 (1985) (speech involving no matters of public concern has "reduced constitutional value"); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, at 49, n. 2 (1986) ("society's interest in protecting [sexually explicit material] is of a wholly different, and lesser, magnitude...."). See also SDJ, Inc. v. City of Houston, 837 F 2d 1268 (1988), rev. den., 57 LW 3566 (1989)

presence in the lives of all Americans, confronting citizens not only in public but in the privacy of the home, and it is readily accessible to children. Id. at 748-750.

44. In sum, the Pacifica Court concluded that the federal prohibition on broadcast indecency burdened a category of speech subject to less than full First Amendment protection 12/ and that the unique attributes of the broadcast media justified this prohibition. The Court in Pacifica did not hold that the Carlin monologue as broadcast was protected by the First Amendment and that a time of day must be found to air it 13/ and did not subject the statutory prohibition on indecent broadcast to any "least restrictive" or rigid "narrowly tailored" means test.

B. The Prohibition On Broadcast Indecency Is To Be Reviewed Under The More Deferential "Reasonableness" Standard

45. Like the zoning ordinance in Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), the prohibition on broadcast indecency simply does not "fit neatly into either the 'content-based' or 'content-neutral' category." Id. at 47. The broadcast statute does treat radio and television stations that air indecent matter different from those which don't but does not foreclose adults who want to hear or view indecent expression from doing so. See Pacifica at 438 U.S. 750, n. 28. The law is not aimed at the content of expression but rather at the undesirable "secondary effects" associated with

13. Cf. Carey v. Brown, 447 U.S. at 477 (Rehnquist, J., with whom the Chief Justice and Blackmun, J. join, dissenting) ("Similarly, in FCC v. Pacifica Foundation, . . . the Court found that an offensive broadcast could be absolutely banned from the airwaves. . . .)

the "uniquely pervasive presence" of the broadcast media – to wit, its intrusiveness and accessibility to children. The broadcast statute protects the privacy of the home and children and clearly does not deny to anyone the use of a medium of communication because of the unpopularity of his or her views. As pointed out by the Pacifica Court, a ban on indecent communication has its "primary effect on the form rather than the content of serious communication." Id. at 743, n. 18; see Bethel School District No. 403 v. Fraser, 478 U.S. at 682-683; Frisby v. Schultz, 56 LW 4785, 4789 (1988); Erznoznik v. City of Jacksonville, at 422 U.S. 222-23 (Burger, J., with whom Rehnquist, J., joins, dissenting). The prohibition on broadcast indecency, like the prohibition on sound trucks emitting "loud and raucous noises" upheld in Kovacs v. Cooper, 336 U.S. 77 (1949), is therefore a regulation on the manner or place of communication and is distinguishable from the "content-based" prohibition on signs bringing "foreign governments into "public disrepute" invalidated in Boos v. Barry, 56 LW 4255 (3/22/88). Further, society's interest in protecting "indecent" expression, like the "adult" fare in Renton, is of a "wholly different, and lesser magnitude." Id. at 49, n.2.

46. But even if the prohibition on broadcast indecency involves a restriction on the content of expression, it is nevertheless permissible because of the special and overriding governmental interests implicated. In Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), the Supreme Court upheld a zoning ordinance which treated commercial establishments specializing in "adult" fare differently from other kinds of commercial establishments, concluding that the ordinance was aimed not at the content of the fare but at the secondary effects of the establishments. Justice Powell, in his concurrence, elaborated at 427 U.S. 82, n. 6:

> [the] dissent misconceives the issue in this case by insisting that it involves an impermissible time, place, and manner restriction based on the content of expression. It involves nothing of the kind. We have here merely a decision by the city to treat certain movie theaters differently because they have markedly different effects upon their surroundings.... Moreover, even if this were a case involving a special governmental response to the content of one type of movie, it is possible that the result would be supported by a line of cases recognizing that the government can tailor its reaction to different types of speech according to the degree to which its special and overriding interests are implicated. See, e.g., Tinker v. Des Moines School District., 393 U.S. 503, 509-511 (1969); Procunier v. Martinez, 416 U.S. 396, 413-414 (1974); Greer v. Spock, 424 U.S. 828 (1976) (Powell, J. concurring)....

47. Two of the cases mentioned above by Justice Powell which in fact limited government's power to prohibit expression have since been distinguished. Tinker v. Des Moines School District was distinguished in Hazelwood School District v. Kuhlmeier, 56 LW 4079 (1/13/88), where the Court stated that educators can exercise "editorial control" over student speech in school-sponsored activities if their actions are "reasonably related to legitimate pedalogical concerns." Id. at 4082. [emphasis supplied] Procunier v. Martinez was distinguished in Thornburgh v. Abbott, 57 LW 4517 (5/15/89), where the Court held that the proper inquiry is whether the government objective is legitimate and neutral

and the regulations "reasonably related to legitimate penological interests." Id. at 4521. [emphasis supplied]

48. In Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (1979), cert. den., 447 U.S. 929 [1980), the Fourth Circuit upheld a North Carolina "sex supermarket" statute providing that a single building may contain only one type of "adult establishment." Concluding that the Supreme Court decision in Young v. Mini Theatres, Inc. "essentially controlled" the case before it, the Fourth Circuit then said at 612 F.2d 830-31:

> Moreover, we believe that a classification by content may be permissible in circumstances such as those involved here where the state has acted to protect other overriding interests. See, e.g., FCC v. Pacifica Foundation... (plurality opinion) (upholding ban on nonobscene but 'filthy' words on afternoon radio broadcast); Lehmen v. City of Shaker Heights, 418 U.S. 298...(upholding political, but not commercial, advertising on public transit vehicles); California v. LaRue, 409 U.S. 109...(upholding proscription of nonobscene erotic dancing or movies in places where liquor was served).

49. The Supreme Court in Renton v. Playtime Theatres, Inc., at 475 U.S. 48-50, 52 also indicated that the zoning ordinance could be justified either as a time, place and manner regulation or as a classification by content and also indicatedthat the standard of review was the same in either instance:

> At first glance, the Renton ordinance,

like the ordinance in American Mini Theatres, does not appear to fit neatly into either the "content-based" or the "content-neutral" category.

[I]n American Mini Theatres, a majority of this Court decided that...zoning ordinances designed to combat the undesirable secondary effects of such ["adult"] businesses are to be reviewed under the standards applicable to "content neutral" time, place and manner regulations. Justice Stevens, writing for the plurality...not[ed] that "[i]t is th[e] secondary effects which these zoning ordinances attempt to avoid, not the dissemination of offensive speech".... JUSTICE POWELL, in concurrence, elaborated:

> "[T]he dissent misconceives the issue in this case.... ...We have here merely a decision by the city to treat certain movie theatres differently because they have markedly different effects upon their surroundings.... Moreover, even if this were a case involving a special governmental response to the content of one type of movie, it is possible that the result would be supported by a line of cases recognizing that government can tailor its reaction to different types of speech

> according to the degree to which its special and overriding interests are implicated." [case Citations omitted here]
>
> The appropriate inquiry in this case, then, is whether the Renton ordinance is designed to serve a substantial governmental interest and allows for reasonable alternative channels of communication.
>
> ....
>
> "The city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems."

50. Morality in Media would suggest that the prohibition on broadcast indecency can be justified either as a "time, place and manner regulation" or as a "permissible subject matter regulation." The appropriate standard of review is therefore not "strict scrutiny" but rather the more deferential "reasonable[ness]" standard utilized in Renton v. Playtime Theatres, Inc.

C. Indecent Broadcast Intruding Into The Home Amounts To A Nuisance And Is A Form Of Unprotected Speech Which Can BeProhibited Without A Showing That The Ban Is A "Precisely Drawn Means Of Serving Compelling State Interest"

51. In its 1975 Declaratory Order, 56 FCC 2d 94, the Commission expressed the opinion that indecency in the broadcast medium should be regulated by principles analogous to those found in the law of nuisance. The Pacifica Court recognized this fact, although in Pacifica the Court was

not faced with the issue of whether the Commission had properly applied the rationale upon which its decision rested nor did the Court consider that question. Id. at 734-735. If the Commission continues to rely upon nuisance principles, it must recognize that "nuisance speech" is unprotected speech and that it is not necessary to find a "compelling" state interest to justify a prohibition on unprotected expression or a "time of day" when it can be broadcast into the home.

52. The United Supreme Court has long recog~nized that the right to speak is not absolute at all times and under all circumstances. In Chaplinsky v. New Hampshire, 315 U.S. 568, 571 -572 (1942), the Court stated:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any constitutional problem. These include the lewd, and obscene, the profane, the libelous, and the insulting or fighting words' – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. [emphasis supplied]

53. The above quote from Chaplinsky is a "paraphrase" of matter found in Zechariah Chafee Jr.'s Free Speech in the United States, pages 149-150 (1941), which was cited by the Chaplinsky Court at 315 U.S. 572, notes 4 & 5. Chafee in his book says the following:

> But the law also punishes a few classes of words like obscenity, profanity, and gross libel upon individuals, because the very utterance of such words is considered to inflict a present injury upon listeners, readers, or those defamed, or else to render highly probable an immediate breach of the peace.

[T]hese verbal peace time crimes. .are too well-recognized to ~question their constitutionality, but I believe that if they are properly limited, they fall outside the protection of the free speech clauses.... ...The true explanation...is that profanity and indecent talk and pictures, which do not form an essential part of any exposition of ideas, have a very slight social value as a step toward truth, which is clearly outweighed by the social interests in order, morality, the training of the young, and the peace of mind of those who hear and see. ...The man who swears in a street car is as much of a nuisance as the man who smokes there.14

14. So too, the Model Penal Code, Section 250.2 (Proposed Official Draft 1962) prohibits "offensively coarse utterances" apart from any tendency to provoke violence. The explanation is found in Model Penal Code Tentative Draft 13, at p.7 (1961):

> Coarse or indecent language is penalized under clause (b) regardless of any actual or presumed tendency to evoke disorder among the hearers, since the interest we seek to protect is freedom from present nuisance rather than freedom from anticipated violence. The concept of present injury is the basis on which Chafee rested the 'Normal Criminal Law of Words.'.... A rule that words may be punished only if they tend to provoke violence would give immunity to disgus~ting public verbal behavior merely because the unwilling audience comprised only persons too timid, weak, or well-behaved to respond with disorderly violence.

[emphasis supplied]

54. In Kovacs v. Cooper, 336 U.S. 77 (1949), the Supreme Court 15/ held that a city could forbid the use of "sound trucks" on public streets, stating in part at 336 U.S. 87-89:

> In his home or on the street he is practically helpless to escape this interference with his privacy by loud speakers ... ...That more people may be more easily and cheaply reached by sound trucks...is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance. [emphasis supplied]

55. In Rosenfeld v. New Jersey, 408 U.S. 901, at 905-06 (1972), a memorandum case in which a defendant used concededly filthy language during a public school board meeting, three Justices of the Court, writing in dissent, stressed the "grossly offensive and emotionally disturbing" nature of the speech involved:

> But the exception to First Amendment protection recognized in Chaplinsky is not limited to words whose mere utterance entails a high physical violence.
>
> ....
>
> I agree with th[e] view that a verbal assault on an unwilling audience may be so grossly offensive and emotionally disturbing

15. See City of Lakewood v Plain Dealer Publishing Co., 56 LW 4611, at 4915, n 9 (6/17/88)("Clearly, in Kovacs the plurality opinion put forth the narrowest rationale for the Court's judgment.")

> as to be the proper subject of criminal proscription, whether under a statute denominating it disorderly conduct, or, more accurately, a public nuisance.
>
> The Model Penal Code...also recognizes a distinction between utterances which may threaten physical violence and those which may amount to a public nuisance, recognizing that neither category falls within the protection of the First Amendment." [emphasis supplied]

56. In Hess v. Indiana, 414 U.S. 105, at 107-108 (1973), the Supreme Court recognized that some words which do not amount to "fighting words" but which do intrude upon the privacy rights of others in an essentially intolerable manner are outside the protection of the First Amendment:

> Indiana's disorderly conduct statute was applied in this case to punish only spoken words. It hardly needs repeating that the constitutional guarantees of freedom of speech forbid the States to punish the use of words or language not within "narrowly limited classes of speech." In the first place, it is clear that the Indiana court specifically abjured any suggestion that Hess' words could be punished as obscene.... ....By the same token, any suggestion that Hess' speech amounted to 'fighting words.'...could not withstand scrutiny. ...In addition, here was no evidence to indicate Hess' speech amounted to a public

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> nuisance in that privacy interests were being invaded. [emphasis supplied]

57. In Hazelwood School District v. Kuhlmeier, 56 LW 4079, at 4082 (1988) (upholding a high school principal's decision to delete two articles from a school newspaper, one of which included student comments about "sexual histories"), the Supreme Court stated that a school may disassociate itself not only from speech that would "materially disrupt classwork or involve substantial disorder" but also from speech "that is, for example,...vulgar, or profane or unsuitable for immature audiences." The Court noted that its decision in Bethel School District No. 403 v. Fraser, 478 U.S. 675 (upholding a school district's authority to prohibit an indecent speech in a school assembly) did not rest upon any finding that the speech had a "propensity" to "materially disrupt" classwork, but rather on its "vulgar," "lewd" and "plainly offensive" character. Kuhlmeier at 4082, n. 4. Mr. Justice Stevens dissented in Bethel on "fair notice" grounds but did note at 478 U.S. 696:

> Justice Sutherland taught us that a "nuisance may be merely a right thing in the wrong place – like a pig in the parlor instead of the barnyard." ...Vulgar language, like vulgar animals, may be acceptable in some contexts, and intolerable in others. See FCC v. Pacifica Foundation.... Indeed, even ordinary, inoff~ensive speech may be wholly unacceptable in some settings. See Schenck v. United States....
>
> It seems fairly obvious that respondent's speech would be inappropriate in certain classroom and formal social settings.

> On the other hand, in the locker room...the...speech might be regarded as rather routine comment.

58. In Pacifica, the Supreme Court recognized that a nuisance can simply be the right thing in the wrong place and did not require the Commission to find a time of day when the broadcast **PIG** would be permitted entrance to the parlor.

CONCLUSION

59. Morality in Media urges the Commission to recognize that the "law is the law." If the Statute says 24 hours a day, there is no room for interpretation. There is no ambiguity in 18 U.S.C. 1464, and the Commission may not "legislate" any change or say that it will not enforce the law during certain hours of the day. Out of these proceedings should come a declaration that the law against broadcast "indecency" applies 24 hours a day and that the Commission will consider many variables, including the time of day in determining whether the particular broadcast is "indecent."

60. The Commission must reject the notion that the only valid governmental interest to be furthered by the prohibition on broadcast indecency is protection of children. The United States Supreme Court in FCC v. Pacifica Foundation stated that the prohibition on indecent broadcast furthered **TWO** valid governmental interests, and subsequent decisions of the Supreme Court, including Sable Communications of California v. FCC, 57 LW 4920, clearly indicate that the Court has not "disavowed" the important governmental interest in protecting unwilling adult listeners and viewers in the privacy of the home.

61. The Commission must also reject the notion that

the prohibition on broadcast indecency may be sustained only if the government can show that the regulation is a "precisely drawn means of serving a compelling stated interest." Consolidated Edison Co. v Public Service Commission, 447 U.S. at 540, quoted in Action for Children's Television v. FCC, 852 F.2d 1332, at 1343, n.18 (D.C. Cir. 1988). In Action For Children's Television v. FCC, the District of Columbia Circuit overlooked or ignored the fact that in Consolidated Edison the United States Supreme Court said that the Commission order in Pacifica was justified as a "permissible subject matter regulation" — **NOT** as a "narrowly tailored means of serving a compelling state interest."

62. Morality in Media suggests that the prohibition on broadcast indecency is also properly viewed as a valid restriction on the manner or place of expression. But in either case, the appropriate standard is not "strict" or "heightened" scrutiny but rather the more deferential "reasonableness" standard enunciated in Renton.

63. Morality in Media does not say that every depiction or description of nudity or of sexual or excretory activities or organs distributed to adults can be criminalized "solely because [it is] indecent." Sable Communications of California v. FCC, at 57 LW 4923. What Morality in Media does say is that "both the content and the context of speech are critical elements in First Amendment analysis" [Pacifica at 744] and that in the broadcast medium "indecent" matter can be criminalized constitutionally regardless of the time of day in which it is broadcast. The Commission is to be reminded that it is the plurality opinion in Pacifica that is the Court opinion, and in Pacifica the Supreme Court did not hold that the Commission must set aside a time of day when indecent broadcast can be aired and did not say that the

Commission must show that multitudes of youngsters were "tuning in" at all hours of the night in order to ban it twenty four hours a day. In Pacifica, the Supreme Court held that "First Amendment protection" of the monologue as broadcast was not "required." Id. at 746. In Pacifica the Supreme Court said that a parlor was a wrong place for a pig and upheld the Commission's power to keep the pig out of the parlor apart from any determination that the pig is "obscene." Id. at 750-51.

64. In Red Lion Broadcasting Co. v. FCC, 397 U.S. 367, the Supreme Court concluded that just as Government could limit the use of sound trucks producing sounds so "noisy that it drowns out civilized private speech," so Government could also "limit the use of broadcast equipment" to prevent a broadcaster from"snuff[ing] out the free speech of others." Id. at 387. What the Supreme Court said in Kovacs v. Cooper, 336 U.S. at 88-89 about sound trucks emitting "loud and raucous noises" could also be said about broadcast stations uttering "indecent language:"

> We need not determine whether this ordinance...is regulatory or prohibitory. All regulatory enactments are prohibitory as far as their restrictions are concerned.... ...The question is whether or not there is a real abridgement of the rights of free speech....
>
> The preferred position of freedom of speech in a society that cherishes liberty for all does not require legislators to be insensible to claims by citizens to comfort and convenience. To enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself. That more people may be easily and

> cheaply reached by sound trucks...is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open.

Respectfully submitted

MORALITY IN MEDIA, INC.
475 Riverside Drive, Suite 239
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January 16, 1990
Robert W. Peters, Esq

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Enforcement of	)	MM Docket No.
	)	89-494
Prohibitions Against	)	
Broadcast Indecency	)	
in 18 U.S.C. §1464	)	

REPLY COMMENTS

Morality in Media, Inc., hereby submits its **REPLY COMMENTS** as authorized in the Commission's Notice of Inquiry, FCC 89-307, Released November 20, 1989. Morality in Media is an interfaith, nonprofit charitable corporation organized in 1968 for the purpose of combating the distribution of obscene materials in the United States. Morality in Media appeared as Amicus Curiae in Action For Children's Television et al. v. Federal Communications Commission, 852 F.2d 1332 (D.C. Cir. 1988). It had previously submitted Comments in response to the Commission's Public Notice, FCC 87-153. Morality in Media also appeared as Amicus in support of the FCC in Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726 (1978). Specifically, Morality in Media's Reply Comments address Comments submitted by Action For Children's Television, et al., The United States Catholic Conference, and The Pacifica Foundation, et al.

REPLY COMMENTS TO COMMENTS OF ACTION FOR CHILDREN'S TELEVISION, ET AL.

Point I

The Commission Must Assert That Government Has A Valid Interest In Protecting Adults From Intrusive, Indecent Broadcast

In Comments filed pursuant to the Commission's Notice of Inquiry, FCC 89-307, Action For Children's Television, et al. ("ACT") state at pages 5-6 of their Comments that the "Commission has recognized" that government has "no legitimate interest in protecting adults from indecent material" and that the Supreme Court has "expressly disavowed" any governmental interest in protecting adults from indecent broadcast.

The Commission is to be reminded that it is Congress and the Supreme Court which determines whether the government has a "legitimate interest" in protecting adults fro~ assaults, in the form of broadcast indecency intruding into the privacy of the home, and that in FCC v. Pacifica Foundation, 438 U.S. 725 (1978) ("Pacifica"), both the plurality and concurring opinions were in agreement that government does have a valid interest in protecting adults from such broadcast. As Mr. Justice Powell, concurring in Pacifica, noted at 438 U.S. 759-60:

> "A second difference, not without relevance, is that broadcasting...comes directly into the home, the one place where people ordinarily have the right not to be assaulted by uninvited and offensive sights and sounds. Erznoznik v City of Jacksonville . . . . . Although the First Amendment may require unwilling

> adults to absorb the first blow of offensive but protected speech when they are in public before they turn away, see, e.g., Erznoznik . . ., a different order of values obtains in the home. . . . This is not to say . . . that the Commission has an unrestricted license to dicide what speech, protected in other media, may be banned from the airwaves in order to protect unwilling adults from unwilling exposure to it in their homes. . . . But this responsibility has been reposed initially in the Commission . . . ."

The cases cited by ACT at page 6, note 15, of its Comments in support of its assertion that the Supreme Court has "disavowed" any governmental interest in protecting adults from broadcast indecency are inapposite. While the Supreme Court in Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983) did state that the asserted govermental interest in shielding adults from "offensive" mailings "carries little weight, " the Bolger Court was also careful to distinguish Pacifica, noting at 463 U.S. 74:

"Our decisions have recognized that the special interest of the government in regulation of the broadcast media does not readily translate into a justification for regulation of other means of communication. See . . . FCC v. Pacifica Foundation . . . (broadcasting has received the most limited First Amendment protection.)."

Boos v. Barry, 56 LW 4254 (1988), concerned a display ordinance which "operate[d] at the core of the First Amendment by prohibiting petitioners from engaging in classiscally political speech," "bar[red] such speech . . . on traditional public fora," and prohibited an "entire category of

display ordinance which "operate[d] at the core of the First Amendment by prohibiting petitioners from engaging in classically political speech," "bar[red] such speech . . . on traditional public fora," and prohibited an "entire category of speech." Id. at 4256. "Our cases," wrote the Boos Court, "indicate that...a content-based restriction on political speech in a public forum...must be subjected to the most exacting scrutiny." Id. at 4257. The prohibition on broadcast indecency, however, concerns speech which lies "at the periphery of First Amendment concern." Pacifica, at 438 U.S. 743. Further, like the prohibition on home picketing upheld in Frisby v. Schultz, 56 LW 4785 (1988), the prohibition on indecent broadcast furthers the government's interest in protecting residential adult privacy and is a restriction on the "form of communication as opposed toregulation of communications due to the ideas expressed 'which strikes at the core of the First Amendment values.'" Id. at 4789; see Pacifica, 743, n. 18; 746, n. 22.

In Hustler Magazine, Inc. v. Falwell, 56 LW 4180, 4182 (1988), the Supreme Court did say that it is necessary to give "adequate 'breathing space' to the freedoms of the First Amendment." But the same Court also said at page 4182:

> "Admittedly, these oft repeated First Amendment principles, like other principles, are subject to limitations. We recognized in Pacifica Foundation, that speech that is "'vulgar," "offensive," and "shocking"' is 'not entitled to absolute constitutional protection under all circumstances.' ...These limitations are but recognition of the observation in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc....that this Court has 'long recognized that

not all speech is of equal First Amendment importance.'" Id. at 4182

ACT also states in its Comments, at page 5, that in Sable Communications of California v. FCC, 57 LW 4920 (1989) ("Sable"), the Supreme Court "unambiguously held" that indecent, non-obscene expression is protected by the First Amendment and that in Pacifica there was "'unanimous agreement that the Carlin monologue [was] protected speech.'"

The question of whether indecent expression is protected by the First Amendment, however, was not at issue in Sable. In Sable, the sole issue, as framed by the parties themselves, was whether a total ban on what the parties considered a form of protected expression – to wit, indecent commercial telephone messages – could be justified solely on a protection of minors rationale. Further, in Sable the Court simply said that indecent communications cannot be criminalized "solely because they are indecent." Id. at 4923. [emphasis supplied] The Sable Court did not say that "indecent" matter was protected in every context. The Sable Court was careful to note the differences between the "private telephone communications" at issue in the case before it and the "public radio broadcasting" at issue in Pacifica and was careful to present, with some detail, how these differences impact adults:

> "The Pacifica opinion also relied on the 'unique' attributes of broadcasting, noting that broadcasting is 'uniquely pervasive,' can intrude on the privacy of the home without prior warning as to program content, and is 'uniquely accessible to children ...' The private commercial telephone communications

> at issue here aresubstantially different from the public radio broadcasting at issue in Pacifica. ...There is no 'captive audience' problem here; callers will generally not be unwilling listeners. The context of dial-in services...is manifestly different from a situation in which a listener does not want the received message. Placing a phone call is not the same as turning on a radio and being taken by surprise. ...[T]he message received by one who places a call to a dial-a-porn service is not so invasive or surprising that it prevents an unwilling listener from avoiding exposure to it." Sable at 4923. [emphasis supplied]

In Pacifica, the Supreme Court readily acknowledged that "some uses" of even the most offensive words are "unquestionably protected" and "assume[d], arguendo," that the particular Carlin monologue at issue "would be protected in other contexts." Id. at 438 U.S. 746. [emphasis supplied] At issue in Pacifica, however, was the question whether the Carlin monologue "as broadcast" was indecent and "prohibited" by 18 U.S.C. 1464. The Pacifica Court answered that question in the affirmative. The Pacifica Court did not hold that the Carlin monologue "as broadcast" was protected expression. Nor did it hold that the Federal broadcast statute is unconstitutional in so far as it prohibits indecent broadcast at all times of the day and night.. The Pacifica Court did leave unanswered the question whether it would be permissible to broadcast the vulgar Carlin monologue in the late hours, but in so doing it did not legalize the broadcast of scenes graphically depicting or describing patently offensive "hard core" sexual conduct (such as vaginal intercourse, anal and oral sodomy, masturbation, bestiality, sadomasochism, and

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excretory functions) so long as the live performance, tape or film, which includes the scenes, when taken as a whole, has serious value and is broadcast after 10 p.m., 12 midnight, or 8 p.m.

The Commission is to be reminded that in FCC v. Pacifica Foundation, the Supreme Court spoke on the subject of broadcast indecency. The Court affirmed the Commission's holding that the Carlin monologue "as broadcast was indecent and prohibited by 18 U.S.C. 1464" and did not say that the Commission must find a time of day when the broadcast pig can enter the parlor of every American home. The Pacifica Court said that two governmental interests justified this prohibition: protecting unwilling adults in the privacy of the home and protecting minors. The Supreme Court has not "disavowed" the first valid governmental interest, and the Commission must now assert it. Otherwise, the Commission will be right where it was in Sable – i.e., having the very difficult task of showing that the 24 hour ban is the least restrictive means to further the government's compelling interest in protecting minors.

Point II

At Most The Commission's Definition Of Indecency Will Deter Only The Broadcasting Of Patently Offensive References To Excretory And Sexual Organs And Activities

ACT asserts at pages 6-7 of its Comments:

> "[T]he effect of the statutory ban sweeps far beyond those few programs that the Commission has so far specifically held to be indecent. As defined by the Commission, the

term 'indecency' encompasses a broad and diverse range of material of poten.ial social value.

It is not an overstatement to assert that if indecent speech is completely suppressed in the broadcast medium, this will substantially impede the ability of many broadcasters to portray contemporary American society in the programs they offer."

Similar arguments were of course raised and summarily rejected by the Supreme Court in Pacifica at 438 U.S. 743:

"It is true that the Commission's order may lead some broadcasters to censor themselves. At most, however, the Commission's definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities. The danger dismissed so summarily in Red Lion...was that broadcasters would respond to the vagueness of the regulations by refusing to present programs dealing with important social and political controversies. Invalidating any rule on the basis of its hypothetical application to situations not before the Court is 'strong medicine'.... We decline to administer that medicine to preserve the vigor of patently offensive sexual and excretory speech."

Indecency in the broadcast medium has been prohibited since the Radio Act of 1927 was signed into law

and few would deny that the last sixty years have been an "'extraordinarily vigorous period,' not just in economics and politics, but in belles lettres and in 'the outlying fields of social and political philosophies'" and that the broadcast media have been at the forefront of this era of "unfettered interchange of ideas for the bringing about of political and social changes." Miller v. California, 413 U.S. 15, 34-35 (1973).

So too in Congress the vigor of legisla.ive debate has not in the least been dampened by the prohibition in the House of Representatives on the "use of indecent language." As the Supreme Court noted in Bethel School District No. 403 v. Fraser, 478 U.S. 675, 681-82 (1986):

> "In our Nation's legislative Halls, where some of the most vigorous political debates in our society are carried on, there are rules prohi'oiting the use of expressions offensive to other participants in the debate. The Manual of Parliamentary Practice, drafted by Thomas Jefferson and adopted by the House of Representatives....provides that '[n]o person is to use indecent language against the proceedings of the House.'" [emphasis supplied]

A continuation of the long established prohibition on broadcast indecency will not in any way stifle expression of serious literary, artistic, political or scientific ideas. As the Supreme Court noted in Pacifica, at 438 U.S. 743, n. 18, a prohibition on "indecent" expression has "its primary effect onthe form, rather than the content, of serious communication."

Point III

The Supreme Court as Long Recognized That Each Medium Of Expression Presents Special First Amendment Problems

ACT argues at pages 9-10 of its Comments that "free speech may not be 'abridged on the plea that it may be exercised in some other place'" and asserts that "every decision cited in the long history of this proceeding, whether in broadcasting, cable, telephone, or print has unhesitatingly concluded that blanket bans on indecency violate the First Amendment."

But in Pacifica the Supreme Court said that the Commission's action does "not by any means reduce adults to hearing only what is fit for children" because:

> "Adults who feel the need may purchase tapes and records or go to theatres and nightclubs to hear these words." Id. at 438 U.S. 750, n. 28.

The cases cited by ACT to support its proposition that "blanket bans on indecency" are unconstitutional either carefully distinguish the Court's Pacifica decision or invalidate a law intended to protect only minors or invalidate a law which encompassed a broad range of material not prohibited here or which was vague. In Pacifica the Supreme Court said that "each medium of expression presents special First Amendment problems" and that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." Id. at 748. Subsequent decisions of the Court have reaffirmed that the "'unique' attributes of broadcasting" justify special regulation of it. Sable, at 57 LW 4923; see Bolger v. Youngs Drug Products

Corp., at 463 U.S. 74.

ACT also asserts, at page 10 of its Comments, that "no one has ever suggested that the [Pacifica] case sustained total suppression of indecent speech." But in Pacifica the Supreme Court did not say that the Commission must find a time of day to air indecency in the broadcast medium, and Pacifica is still the Law.

Morality in Media would add that it insists that Pacifica sustains a total suppression of matter indecent "as broadcast" and that in Carey v. Brown, 447 U.S. 455, 477 (1980), Rehnquist, J., with whom the then Chief Justice and Blackmun, J. joined, dissenting, wrote:

> "Similarly, in FCC v. Pacifica Foundation.... the Court found that an offensive broadcast could be absolutely banned from the airwaves...." [emphasis supplied]

Point IV

The Supreme Court Has Recognized The Injurious Nature of "Indecent" Expression

ACT is correct in asserting, at pages 14-15 of its Comments, that "indecent" is a legal standard separate and apart from "harmful to minors." The "indecent" standard is an Indecent For All standard and is determined for a mixed audience of both adults and children. The "harmful to minors" standard upheld in Ginsberg v. New York, 390 U.S. 629 (1968) is specifically aimed at protecting minors from material harmful to them.

But ACT is wrong in assuming that the Commission

must provide "scientific" data to show that exposure to "indecent" broadcast harms minors. The Federal "dial-a-porn" statute at issue in Sable involved a prohibition on obscene or "indecent" telephone communications for commercial purposes, and, as noted in Carlin Communications, Inc. v. FCC, 837 F.2d 546, at 558 (2d Cir. 1988), cert. den., 109 S.Ct. 305 (1988): "The use of 'indecent' [in 47 U.S.C. 223(b)] was clearly made with Pacifica...in mind." The Sable Court did not say that Government's compelling interest in protecting the physical and psychological well-being of minors extends only to material deemed "harmful to minors." The Sable Court said that this compelling interest extends to literature that is "not obscene by adult standards," citing both Ginsberg and New York v. Ferber, 458 U.S. 747 (1982). Ferber involved non-obscene depictions of children engaging in sexual conduct.

FCC v. Pacifica Foundation involved a vulgar but non-obscene monologue which clearly did not "appeal to the prurient interest" and which therefore was not "harmful to minors." The Pacifica Court did not require the FCC to establish that Carlin's "shock-radio" dialogue, which was "indecent as broadcast," caused harm to minors. As a matter of fact, the Supreme Court likened the impact of the monologue on adults to a physical assault. Id. at 438 U.S. 748-49.

Nor did the Supreme Court require the School District in Bethel School District No. 403 v. Fraser, to establish that the student's "indecent speech," which no one contended was obscene for minors, caused harm to the students. Rather the Court said at 478 U.S. 683-84:

> "The pervasive sexual innuendo in Fraser's speech was plainly offensive to both teachers

and students-indeed to any mature person. By glorifying male sexuality, and in its verbal content, the speech was acutely insulting to teenage girl students. See App 77-81. The speech could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality. Some students were reported as bewildered by the speech and the reaction of mimicry it provoked." [emphasis supplied]

In Prince v. Massachusetts, 321 U.S. 158 (1944), the Court upheld a statute prohibiting children under 12 from selling newspapers on the street. Appellant, the child's aunt, contended among other things that the child's presence on the street distributing religious magazines, was "in no way harmful to" the child and that the State had not shown that the prohibition on street selling was "necessary for or conducive to the child's protection against some clear and present danger." Id. at 167. In response, the Court said that "the state's authority over children's activities is broader than over like actions of adults." Id. at 168; quoted in City of Dallas v. Stanglin, 57 LW 4408, n.4. The Prince Court also said that the child's activity presented stated and unstated "harmful possibilities...of emotional excitement and psychological or physical injury." Id. at 321 US. 170. [emphasis supplied]

The Commission is again to be reminded that in Pacifica the Supreme Court was also concerned about protecting adults, and that a "gravamen" of a broadcast indecency complaint is that:

"Patently offensive, indecent material

> broadcast over the airwaves confronts the citizen, not only in public, but in the privacy of the home, where the individual's right to be let alone plainly outweighs the First Amendment rights of an intruder." Id. at 748. [emphasis supplied]

The Pacifica Court said that "indecent" speech offends "for the same reasons that obscenity offends" and that:

> "such utterances are no essential part of any exposition of ideas, and...any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Id. at 746. [emphasis supplied]

The Pacifica Court did not probe to see whether this asserted governmental interest was "compelling" and did not subject the prohibition on indecent broadcast to "exacting scrutiny" to see if it was the "least restrictive means." Rather the Court treated the indecent broadcast as it did the obscene materials in Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) and Kaplan v. California, 413 U.S. 115 (1973) – where the Court held that a legislative body may act to protect adults and minors from such material even though there is no conclusive evidence or empirical data that exposure to it adversely affects adults or children or their society.

Point V

The Government Has An "Independent Interest" In The Well-Being Of Its Youth

ACT asserts at page 19 of its Comments that "the case law makes clear that...the government's interest is not in barring minors from indecency, but rather in 'facilitat[ing] parental supervision of children's listening' and viewing...."

Clearly, the Supreme Court has never said any such thing. In Ginsberg v. New York, 390 U.S. at 639-40, the Supreme Court identified "two interests" that justified the statute's limitations upon "the availability of sex materials to minors:" 1. supporting parents in the discharge of their responsibility for children's well being; and

2. "an independent interest in the well being of its youth." [emphasis supplied]

In FCC v. Pacifica Foundation, the Supreme Court noted that in Ginsberg the "government's interest in the 'well-being of its youth' and in supporting parent's claim to authority in their own household' justified the regulation of otherwise protected expression." Pacifica at 749. [emphasis supplied] The Pacifica Court then said at 438 U.S. 750:

> "The ease with which children may obtain access to broadcast material coupled with the concerns recognized in Ginsberg, amply justify special treatment of indecent broadcast." [emphasis supplied]

More recently, the Supreme Court upheld a school

disciplinary rule as applied to a student who made an "indecent speech" in a school assembly. Bethel School District No. 403 v. Fraser. The Bethel Court was apparently not concerned that some parents may have found the speech "entertaining" and did not look to see if a "less restrictive means," short of a total prohibition, was available. Rather, the Bethel Court said that a high school assembly is "no place" for a sexually explicit monologue directed at an "unsuspecting audience." Id. at 478 U.S. 685. [emphasis supplied]

In Stanglin v. City of Dallas, 744 S.W. 2d 165 (Tex. App. 1987), the Court of Appeals invalidated a city ordinance provision which limited use of dance halls to children between 14 to 18 and which was intended to "restrict the activities of minors in a manner that limits their presence around...sexually oriented behavior." Id. at 168. . Among other things, the Court of Appeals concluded that the ordinance "inhibits, rather than promotes, the parental role in child rearing. It is the primary responsibility of the parent, not the City, to tell the minor how old his dance partner is." Id. at 170. The United States Supreme Court did not discuss the parental role issue, but it did reverse the judgment of the Court of Appeals in City of Dallas v. Stanglin, 57 LW 4406 (4/3/89).

Point VI

Government Has An Interest In Protecting Both "Supervised" And Unsupervised Children From Broadcast Indecency

As to the assertion at page 22 of ACT's Comments that Government's only interest is in protecting "unsupervised children" from exposure to indecent material,

the Commission is to be reminded that FCC v. Pacifica involved a complaint made by "a man, who stated that he heard the broadcast while driving with his young son." Id. at 438 U.S. 730.

Parental or adult "supervision" is of course a factor to be considered when the parent or adult, by virtue of his or her presence, can control what the child hears or sees, but as the Supreme Court pointed out in Pacifica, the broadcast audience "is constantly tuning in and tuning out, so that prior warnings cannot protect the listener or viewer from unexpected program content." Id. at U.S. 748. As noted in Bolger v. Youngs Drug Products Corp., at 463 U.S. 74, the broadcast media are more "intrusive and uncontrollable" than the mails. No parent or adult can possibly shield a child from an "unexpected outburst on a radio broadcast." Sable, at 57 LW 4923.

Citing the results of a survey conducted by National Research, Inc., ACT nevertheless asserts at pages 30-34 of its Comments that the vast majority of children are in the "presence" of an "adult" or parent most of the time, that "opportunities" for parental or other adult supervision are therefore "extensive," and that it "is enough that the opportunity for parental supervision exists."

The survey concept of "adult/parental presence" is, however, misleading. Nowhere were the interviewees told what this concept means. Interviewees were not specifically told, for example, that in order to be "present" the adult or parent must be in the same room as the child and be there at all times. Nor were the interviewees told that in order to be "present" the adult or parent must be mentally in a position to know what the child is viewing or hearing. A parent or adult who is senile or mentally retarded or mentally ill or

intoxicated or asleep or on the telephone or listening to a tape with headphones in his or her ears may not know what the child is viewing or listening to.

Similarly, it is highly unlikely that a school bus driver would know what children are listening to in the back of the bus and that a school teacher would know what students are listening to during breaks and free periods.

The survey also appears to equate the time when children and teens close the bedroom door at night with the time they "go to sleep" – which is, of course, ridiculous. Many children and teens listen to radio or watch TV for hours after the "lights are out."

Nor does ACT explain how the "presence" of adults and parents who must also "go to sleep" at night provides them an "opportunity for parental supervision."

The survey also apparently assumes that persons 18 or older know what is best for children and younger teens, since the data show the percent of children in the "presence of an adult" and define "adult" as being 18 or older. At least when it comes to certain dance halls, however, both the City of Dallas and the Supreme Court think that "mixing up these [older] individuals with youngsters that [sic] have not fully matured," can have quite the opposite effect. See City of Dallas v. Stanglin, at 57 LW 4408.

One also properly wonders about the households too poor to have a phone or the households which would not cooperate with the interviewer.

In Pacifica the Supreme Court noted that the broadcast media had established a "uniquely pervasive

presence in the lives of all Americans" and that broadcasting is "uniquely accessible to children." Id. at 749-50. ACT nevertheless attempts to equate a child being in "adult/ parental presence," being "at school" and being "asleep" with "opportunity for supervision" and then asserts that "opportunity for supervision is all that is required." Short of confining a child or teen twenty-four hours a day in a sound proofed isolation unit, without radio or TV, however, it is difficult to imagine what a parent can do who does not want her or his children to have access to or be exposed to the ever increasing barrage of indecent broadcast. The broadcast media disseminate their programs generally, and there simply isn't any feasible way to protect the vast majority of children whose parents do not want them to have access to or be exposed to "indecent" broadcast,while providing access to the few children whose parents don't mind.

We also at this point reply to another survey noted by ACT in its Comments, at page 26, n.65. As described in the Comments, this "Gallup survey of New York area households with children between the ages 6 and 11...shows that in 99.6 percent of the households surveyed, no children in that age group listen to the Howard Stern morning radio show." [emphasis supplied] As reported in Arbitron's "Radio Market Report" for New York, Summer 1989, however, only five of the forty-eight stations listed in the "Report" for the New York City Metro area have a greater teen listening audience than WXRK-FM during the Monday thru Friday 7 AM to 8 AM time slot – when WXRK-FM broadcasts the second half of Howard Stern's morning show. Arbitron's Su~mer of 1989 New York "Radio Market Report" shows that the "Hour by Hour, Monday-Friday, AQH(00)" figure for the 7 AM to 8 AM time period for Station WXRK-FM is 106 – which means that an estimated 10,600 children, age 12 to 17, in the New York City Metro area listened to the Stern

program at least five minutes within any quarter hour during the 7 AM to 8 AM time slot, Monday thru Friday, in the Summer of 1989.

In Ginsberg v. New York the Supreme Court said that parents and others who have "the primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." Id. at 390 U.S. 639. The statistics on teens pertaining to "unwanted" pregnancies, venereal diseases, alcohol and drug abuse, suicide and violent crime certainly indicate that most parents need all the help they can get. The Federal broadcast indecency statute is a law that does indeed support parents, and its protective reach is needed around the clock.

Point VII
The Commission's Definition Of "Indecent" Is Not Vague

ACT states at page 36 of its Comments that in Sable, the contention that the Commission's definition of "indecency" is vague was "briefed and argued...but not decided."

What ACT fails to say, however, is that in Sable the Supreme Court again refused the invitation to overturn the FCC definition of " indecency" on vagueness grounds. Clearly, it could have done so, and by indicating that the FCC 's dial-a-porn regulations might be a "satisfactory solution" to the problem of keeping indecent dial-a-porn messages out of the reach of minors, the Sable Court certainly also indicated that the FCC' s def finition of what is "indecent" is a workable one . Justice Scalia, concurring in Sable, also indicated that the Court' s concern was not the Commission' s definition of " indecent" but rather what can

be done about it.

ACT asserts at page 35 of its Comments that the Commission' s def finition of broadcast " indecency" is " unconstitutionally vague. " The Commission' s definition of broadcast "indecency," however, has emerged essentially as the second prong of the 1973 Miller v. California obscenity test, and it was the second prong of its three part definition of obscenity that the Miller Court viewed as providing " fair notice" to dealers in sexually explicit materials:

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe paten.lly offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed. We are satisied that these specific prerequisites will provide fair notice to a dealer in such materials that his public commercial activities may bring prosecution...." Id. at 413 U.S. 27.

While the Court in Miller did not expressly include community standards in the patent offensiveness prong, the Court in Smith v. United States, 431 U.S. 291, 292-93 (1977) specifically noted that "patent offensiveness is measured by community standards." The Smith Court also indicated that for purposes of determining whether a particular definition is unconstitutionally vague, there is a great difference between a general standard of "patently offensive" and a standard of "patently offensive" applied only to sexual conduct specifically defined:

> "The fact that the jury must measure patent

> offensiveness against contemporary community standards does not mean, however, that juror discretion in this area is to go unchecked. Both in Hamling and in Jenkins v. Georgia..., the Court noted that part (b) of the Miller test contained a substantive component as well. The kinds of conduct that a jury ~ould be permitted to label as 'patently offensive'...are the 'hard core' types of conduct suggested by the examples given in Miller." Id. at 431 U.S. 301

The Supreme Court has also made it clear that the primary concern with requiring the finder of fact to apply "community standards" is to insure that the fact-finder does not use his or her own personal standards and that the material is not judged by its impact on the most susceptible or the most insensitive. In Hamling v. united States, 418 U.S. 87 (1974), the trial court instructed the jury that it was to judge the obscenity of the material by reference to national standards. The Supreme Court concluded that standards of the "nation as a whole" delineated a wider geographical area than was warranted but found that the judge's "reference to the standards of the nation as a whole undoubtedly accomplished" the purpose of the community standards test which is to "assure that the material is judged neither on the basis of each juror's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group." Id. at 107.

Broadcast executives who choose to air language or material that depicts or describes sexual or excretory activities will have to make "judgment calls"—just as they have been doing since 1927 and just as they must do if they expect to avoid prosecution for violating 18 U.S.C. 1464's

prohibition on obscenity. Broadcasters are surely aware that 18 U.S.C. 1464 proscribes obscene or indecent language. Every time they consider the Miller obscenity standard, they must consider Miller's "patently offensive specifically defined sexual conduct" prong – which is at the heart of the Commission's definition of "indecent."

In Fort Wayne Books, Inc. v. Indiana, 57 LW 4180, 4183 (1989), the Supreme Court upheld the three-pronged Miller test against a vagueness challenge, and simple logic tells us that if the entire three-part test is not vague, the "patently offensive specifically defined sexual conduct" prong must be precise and not vague. Clearly, the Pacifica Court was satisfied that the Commission's definition would convey sufficiently definite warning. Id. at 438 U.S. 743.

ACT's suggestion, at page 39 of its Comments, that the "variable obscenity standard" enunciated in Ginsberg may be preferable to the Commission's current definition should of course be addressed to Congress, not the Commission. As ACT points out at pages 13-16 of its Comments, the "indecent standard" is different from the "obscene for minors" standard, and the prohibition in 18 U.S.C. 1464 is on obscene or "indecent" matter. Unlike the "obscene for minors" standard, which is intended to protect only minors, the "indecent" standard is an Indecent For All standard. In Pacifica, the Supreme Court was clear that the prohibition on broadcast indecency furthers a valid governmental interest in protecting adults, and it is for Congress, not the Commission, to amend 18 U.S.C. 1464 by deleting the term "indecent" and adding the phrase "obscene for minors."

What the Commission can and should do is to add the word "nudity" to its current definition.

REPLY COMMENTS TO COMMENTS THE UNITED STATES CATHOLIC CONFERENCE

USCC
Comment

"In this Notice the Commission has the opportunity to develop a means of supporting parent's rights to inform their children in the home. The Conference urges the Commission to design regulations which not only require broadcasters to shield minors from indecent material, but which also require broadcasters to identify for parents programs which may contain indecent material."

Reply

This Comment is, in effect, a surrender before the battle is over. It puts the weight of the U.S. Catholic Conference behind a concept that the Federal communication Commission must permit indecency at some hour or hours of the day in the face of a federal statute that prohibits obscene or indecent or profane broadcasting on radio and TV – period – and the Helms Amendment passed by Congress in 1989 that instructs the FCC to enforce that statute 24 hours a day. The reason we say that the Conference has surrendered without a fight is that no case testing this Helms Amendment has yet reached the United States Supreme Court, and in the famous Seven Dirty Words Case (Pacifica) that Court upheld the concept that the statute, 18 U.S.C. 1464, meant what it said and that the FCC rule (which then and now applies 24 hours a day) could be enforced against the broadcast of indecent material by George Carlin. That 1978 Court also indicated that indecency simply meant "non-conformance

with accepted standards of morality" and stated that it could find no constitutional defect in the alternate definition of indecency adopted by the FCC for its purposes. That definition, slightly modified, is found in this Notice of Inquiry, at page 6, as follows:

> "Language or material that, in context, depicts or describes in terms patently offensive as measured by contemporary Community Standards for the broadcast medium, sexual or excretory activities or organs"

The FCC goes on at page 6 of its Notice to state, in direct conflict with the Helms Amendment, that such broadcasts are "actionable" when there is a reasonable risk that children may be in the audience but invites comments as to whether the FCC "should modify its application of the present definition for the purpose of enforcing a 24 hour ban."

Also on page 6 of its Notice of Inquiry, the Commission notes that the legislative history indicated that "Congress imposed the Helms Amendment ban on indecent broadcasts 'to protect the American people, especially children....'"

Congress knew when it passed the Helms Amendment that the FCC was attempting to interpret the statute to permit the broadcasting of "indecency" in the late evening hours, and it is obvious when Congress said enforce the indecency prohibition on a 24 hour basis it was for the purpose of overcoming this reluctance.

The Pacifica decision no where says that indecent material may be broadcast at a particular hour or hours of the

day. What the FCC then stated, and the Court noted in Pacifica, was that in determining whether something was indecent the literary, artistic political or scientific value might be taken into consideration in the late evening. Pacifica, 96 S.Ct 3031, fn.5. This is a far cry from saying that "indecent" matter may be broadcast during late evening hours.

If "indecent" matter were intended to be permitted during late evening hours, Congress would have said so in the original legislation. The FCC cannot legislate an amendment to the statute.

Imagine what it would mean if this were the intent. It would mean that all kinds of sexual activity could be telecast into the home including vivid explicit sexual intercourse, sodomy, bestiality (and all of the horribles mentioned in our Reply Comments to the Pacifica Foundation, et al. Comments found elsewhere in this document) if the program "taken as a whole" had serious literary, artistic, political or scientific value. Congress obviously meant no such thing, and the American people would be horrified if that were the intent of the law. No, indecency is prohibited for 24 hours. What is Indecent is, as the Supreme Court says, a function of many variables." One of those variables is the time of day.

USCC
Comment

"To advance parents' rights to inform their children regarding values, the Commission should require that broadcasters channel indecent broadcasts to time of day when children are most likely to be supervised by parents"...

Reply

This comment is so startling that it is almost unbelievable. What the United States Catholic Conference is suggesting is that the FCC allow indecent broadcasting during the daytime hours or the prime-time hours when children are most likely to be listening to radio or watching TV with a parent. The FCC obviously has no intention or ability to do this. What about the rest of us Americans? Are we to be assaulted by hard c~re sex during prime time viewing in the privacy of our homes simply because in some homes a parent is given the option to "Supervise" their children? What about the latch-key children? No, No – this is not the answer. This approach attempts to give up the statute without necessity or reason.

USCC
Comment

"A regulation requiring broadcasters to air a disclaimer prior to programs containing indecent materials also is a reasonable means of advancing the goal of assisting parents..."

Reply

This is Carte Blanche to the "Indecent" Broadcaster to peddle his or her wares. The answer of course is that indecent broadcasters should be arrested and jailed as the statute provides – not "licensed" by a left handed disclaimer. Such disclaimers cannot redeem an otherwise indecent program.

REPLY COMMENTS TO COMMENTS OF THE PACIFICA FOUNDATION THE NATIONAL FEDERATION OF COMMUNITY BROADCASTERS ALASKA PUBLIC RADIO NETWORK INTERCOLLEGIATE BROADCASTING SYSTEM, INC. PAN AMERICAN CENTER AND ALLEN GINSBERG

The above organizations' Comments are summarized in their Table of Contents, Items IV to XII, and will be treated seriatim.

Comment

Restraints on "Indecent Speech" result in the suppression of material having serious literary, artistic, social and cultural value.

Reply

This is an attempt to relitigate the Pacifica and Act I cases – both of which upheld the power of the FCC to punish the broadcasting of indecent speech or materials. This Comment should be rejected since serious value was not part of the definition of indecency upheld in those cases. The Supreme Court in Pacifica noted in footnote 5 that "the Commission suggested, if an offensive broadcast had literary, artistic, political or scientific value...it might not be indecent in the late evening." Pacifica Foundation, et al., in this Comment, however, are not arguing that the lateness of the hour be taken into the context scale to determine if the

broadcast is indecent, but argue that even if it is indecent, it should be permitted because of its merit. This contradicts Pacifica in a fundamental way, and unless the FCC wants to ignore Pacifica, and the He Ims Amendment, it must reject this Comment. The FCC cannot make new law by regulation. Such is beyond its powers. The Comment in footnote 18 of Pacifica and Company, that "Justice Stevens pointed out that the ruling did not concern works of literary merit" is inaccurate and misleading. Justice Stevens did comment on the FCC approach to Serious Literary Value at footnote 5. What Stevens obviously meant to convey at 438 U.S. 750, fn. 29, is that the content of a program might influence the number of children in the audience. When Pacifica and Company argue that a ban on indecent material should not be implemented, they are arguing not only that the FCC ignore the law but the Supreme Court as well. Actually Indecent Speech is not Censored (banned) by the Helms Amendment or 18 USC 1464 or the FCC. What these laws and Pacifica tell us is that violators can be punished after the fact for these illegal broadcasts.

It should be noted in passing that none of the 70 Literary works mentioned in this Comment have been "banned" by the FCC. There has been no determination by the FCC that they are "indecent" or "obscene." This is an attempt to show "horribles" that have not been shown to exist.

Comment

Works of Merit Must Not Be
Suppressed In the Name of "Decency"

Reply

This is another example of someone fleeing where none pursue. The Reply made to the previous Comment is equally applicable here.

Pacifica and Company agree that the present FCC definition of indecency – Incidentally, blessed by the Supreme Court – "is not intended to give any special weight to merit" but that merit "is one of the many variables that make up the work's context."

This Comment is a plea to the FCC to violate the Helms Amendment, 18 U.S.C. 1464, and the Pacifica case. As such, it should be rejected out of hand as ultra vires and illegal.

What Pacifica and Company asks in this Comment (at Page 20) is for the Commission to "revise" the definition of indecency "to recognize merit as a defense." This the Commissioners may not do under their oath of office. The FCC does not make law – it follows it. Merit cannot be a "defense". It is not part of the definition of "indecency," and it would open the floodgates to permit the prime-time, in color showing of:

Annalingus
Artificial Vagina Display
Beaver shots
Bestiality
Circus Orgies
Coitus
Coprophagy
Coprophillia
Cum-shots
Cunnilingus
Daisy Chain Copulation

Dildoe Display
Ejaculation
Exhibitionism (of the Genitals)
Fellatio
Fetishism
Flagellation
French Tickler Displays
Frottage
Golden Showers
Incest
Orgasm
Masochism
Masturbation
Necrophillia
Pederasty
Voyeurism
Piquerism
Reaming
Sadism
Sadomasochism
Sapphism
Sixty-Nineing
Sodomy
Triolism
Urolagnia
Zooerasty

provided the program has merit.

The American people will not stand still --or this "defense," and Pacifica and IBS and Company are engaging infantasy in urging it.

In passing, it should be noted that the FCC was itself in an Ultra-Vires position when, prior to the Helms

Amendment, it held that its definition of indecency was good 24 hours a day, but that it would not be enforced (i.e., not "actionable") when there was a reasonable risk that children were in the general audience. (Act I, FCC Brief, fn. 22.) This non-actionable approach was, in itself, an attempt by the FCC to legislate – which it had no power to do. It should also be noted that 18 U.S.C. 1464 is a criminal statute – a part of the Federal Criminal Code – which the FCC has no obvious power to interpret.

– Comment

Radio Listeners Are Not Mindless Grazers

Reply

It is significant that this Comment omits any reference to television. A study of television viewers by Television Audience Assessment of Cambridge, Massachusetts reports that in New Britain, Connecticut and Kansas City Missouri, only 55 percent of cable and non-cable viewers plan viewing based on a program guide or newspaper listings, and that 33 percent of non-cable viewers scan channels for alternatives and that "Remote channel switching devices hike scanning among both" cable and non-cable viewers. U.S.A. Today, November 14, 1983, Page 1, Columns 3,5,6 and 7 .

The FCC itself recognized the scanning potential of radio in Sonderling Broadcasting, 27 R.R.2d at 288, where it said "a person will listen to some portion of a talent~ show and turn the dial to try something else" – a process described as "Electronic Smorgasboard Sampling."

Comment

A ban on indecency imposes heavy regulatory duties on broadcasters and deprives them of their First Amendment Rights.

Reply

This is a clear argument to abandon the Indecency Standard. Obviously the FCC may not do this once the Supreme Court and the D.C. Circuit have determined that such a standard does not violate the First Amendment. This Comment must be rejected. The "regulatory duty on broadcasters" is no greater than that imposed to avoid obscenity. In order to determine if a program is obscene and prohibited, a broadcaster must, in that process, determine whether the program is a patently offensive depiction or description of ultimate sexual acts, masturbation or lewd exhibition of the genitals (Miller v. California) – a determination almost identical to the FCC sub-species definition of "Indecency."

Comment

A ban does not balance First Amendment Rights Against Other Concerns – Act I ordered channeling

Reply

This is another attempt to rehash the Pacifica case and Act I, where the indecency concept was upheld. The law does not require proof of harm before it can be enacted. It is enough that the legislature suspects that harm may result. It is up to the challenger to prove that such a belief is irrational. Cf., Ginsberg v. New York, 390 U.S. 629; Paris Adult

Theatre v. Slaton, 413 U.S. 49. In addition, laws may be based on the protection of morals. Bowers v. Hardwick, 106 S.Ct. 2481. Act I was decided before the 24 Hour Instruction of Congress, and the battle lines are drawn at the Helms' Amendment – not at the situation as it existed at the time of Act I.

Comment

Harm To Children Cannot Be
Demonstrated and Cannot be Assumed.

Reply

This is not a correct statement of the law. There is no constitutional requirement that the government demonstrate that harm to minors will occur in the absence of the legislation. Ginsberg v. New York, supra is directly in point inasmuch as it involved the governmental justification of the State of New York in adopting obscene for minors legislation. Justice Brennan gave the Opinion of the Court in that case stating:

> "It was rational for the legislature to find that minors' exposure to such material might be harmful"

That, of course, is the criteria -- a rational belief that harm might result. Nothing more is required for 24 hour indecency legislation aimed at protecting the "American people, especially children." The attempt to denigrate Ginsberg in the Comment ignores the fact that the above is a principle of Constitutional law and does not turn on the fact situation. We are talking about Governmental Justification for laws based on Health, Safety, Welfare and Morals -- not

the facts of the Ginsberg case. In Paris Adult Theatre I v. Slaton, supra, the Supreme Court says at 413 U.S. 60:

> "But it is argued that there are no scientific data which conclusively demonstrates that exposure to obscene material adversely affects men and women or their society. It is urged that absent such demonstration, any kind of state regulation is 'impermissible'. We reject that argument. It is not for us to resolve empirical uncertainties underlying state legislation" ..."Mr. Justice Holmes stated 'the proper course is to recognize that a state Legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution...'"

Since the Comment refers to the general propriety of indecency legislation without a demonstration of harm to children, it is obvious that the quotations above fit. There is no express prohibition in the constitution (see Pacifica v. FCC and Act. I), and absent that, no demonstration of harm is necessary. It is enough that there is a belief **that harm might** result. That criteria is fully satisfied. The Supreme Court in Paris Adult Theatres, at 413 U.S. 62, stated:

> "The fact that a Congressional directive reflects unprovable assumptions about what is good for the people, including imponderable aesthetic assumptions, is not a sufficient reason to find that statute unconstitutional"

Comment

The FCC Is Not A Super Mom

Reply

The argument here is an appeal to the D.C. Circuit Court in Act I and the improper approach taken by the FCC in that case. That is water over the dam since the Helms Amendment was adopted subsequently – and the FCC has shifted its position. The battle lines are now drawn on the Constitutionality of the Helms Amendment. This is ACT II. ACT III may be played out in the Supreme Court arena.

Comment

The regulation of Indecent Material
is Inconsistent With the Commission's
Regulation of Other Forms of Controversial Programming

Reply

The argument that indecent speech is protected by the First Amendment avails nought when you are talking about the Broadcast Medium. There it can be prohibited on the basis of Nuisance Speech in the wrong place. See Pacifica v. FCC. Nowhere does the Pacifica Court Opinion indicate indecent broadcast is protected speech. Merit of course is no defense if the program is indecent.

This Comment evidences wishful thinking as to what the law should be in the opinion of the commentator – not the law as it is.

Comment

A Ban Destroys the Protection

to which Indecent Speech is entitled.

Reply

Indecent speech on radio and TV is "Nuisance" Speech and enjoys no constitutional protection in that medium – cf., Pacifica v. FCC.

Respectfully submitted,

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Nos. 91-952 & 91-883

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHILDREN'S LEGAL FOUNDATION, INC. AND AMERICAN FAMILY ASSOCIATION, INC.,

Petitioners,

—v.—

ACTION FOR CHILDREN'S TELEVISION, THE PACIFICA FOUNDATION, *et al.*,

Respondents.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

Petitioners,

—v.—

ACTION FOR CHILDREN'S TELEVISION, THE PACIFICA FOUNDATION, *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS THE PACIFICA FOUNDATION, PEN AMERICAN CENTER, ALLEN GINSBERG, *ET AL.*, TO PETITIONS FOR WRITS OF CERTIORARI

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January 31, 1992

QUESTION PRESENTED

Whether the court of appeals erred, based on the record before it, in holding that a Federal Communications Commission regulation and a statute that would ban all speech deemed "indecent" by the FCC from broadcast over the radio and television in the United States on a 24-hour per day basis violate the First Amendment, particularly in light of the extraordinarily vague and broad "generic definition" of "indecency" promulgated by the FCC, and in remanding the matter to the FCC for redetermination of numerous unresolved issues.

PARTIES TO THE PROCEEDING

The parties to the proceeding are set forth in the Petition of the Federal Communications Commission, No. 91-952, at ii. None of the respondents herein have any parent companies or subsidiaries. *See* Sup. Ct. Rule 29.1.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

NOS. 91-952 & 91-883

CHILDREN'S LEGAL FOUNDATION, INC. AND
AMERICAN FAMILY ASSOCIATION, INC.
Petitioners,

v.

ACTION FOR CHILDREN'S TELEVISION,
THE PACIFICA FOUNDATION, *et al.*,
Respondents.

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BRIEF IN OPPOSITION OF RESPONDENTS THE PACIFICA FOUNDATION, PEN AMERICAN CENTER, ALLEN GINSBERG, *ET AL.*, TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Respondents The Pacifica Foundation ("Pacifica"), petitioner below, and PEN American Center ("PEN"), Allen Ginsberg, Norman Mailer, William S. Burroughs, Intercollegiate Broadcasting Systems, Inc., National Federation of Community Broadcasters, City Lights Booksellers & Publishers, David H. Halperin, Michael McClure, and Eileen Myles, intervenors below, respectfully request that this Court deny

the petitions for writs of certiorari seeking review of the judgment of the United States Court of Appeals for the District of Columbia Circuit in the above-captioned matter.

STATEMENT OF THE CASE

This case involves an attempt by the Federal Communications Commission ("the FCC") to prohibit at any time of day or night on any radio or television station anywhere in the United States the broadcast of any speech that the FCC believes is "indecent" under the FCC's broad and vague "generic" definition of "indecency." The decision of the court of appeals, which, consistent with decisions of this Court and other courts of appeals, declared unconstitutional this unprecedented ban on the broadcast of core protected speech, is but a stage in one ongoing, incomplete proceeding. The matter has now been remanded to the FCC for redetermination of numerous issues after a full and fair hearing.

At the outset, respondents wish to emphasize that it is the FCC, not Congress, that has chosen a broad definition of "indecency" not limited to "nude dancing . . . adult movies . . . and sexually explicit messages like those now available on the telephone medium." Government Petition, at 10 ("Pet. at __"). Rather, the FCC's definition of "indecency" would ban from the airwaves speech that includes a wide range of serious political, social, literary, and artistic expression at the very core of the First Amendment. Because the plays of Shakespeare, the novels of James Joyce, and the poems of Allen Ginsberg all potentially fall within this definition, the FCC's ban strikes at the very heart of the First Amendment rights of broadcasters, writers and artists, and listeners alike. Although the government suggests that sexually explicit pornographic material will assault the airwaves in the absence of a 24-hour ban on "indecent" speech, Pet. at 10, the fact is that at least since 1975, broadcasters have been permitted to channel

"indecent" speech to the late evening hours. Yet the FCC has not cited a single broadcast of the type of pornographic material that it now claims justifies its draconian ban.

Throughout more than fifteen years of litigation and controversy concerning FCC efforts to censor so-called "indecent" broadcast speech, the FCC has focused consistently, and until very recently, exclusively, on the purported need of enabling parents to protect their *children* from "indecent" speech. Only in the most recent stages of this controversy has the FCC even suggested that its authority to punish "indecent" speech also derives from a claimed power to prevent *any adult* American from receiving indecent broadcast speech in the privacy of his or her home. Now, in its petition to this Court, for the very first time, the government places front and center this asserted "privacy of the home" interest to justify its absolute broadcast ban. In so doing, the government attempts to obscure the fact that the decision of the court below is an unremarkable application, based on its consideration of the evidentiary record, of the well-settled doctrine that an absolute content-based ban on constitutionally-protected speech cannot be sustained when it is obviously not the least restrictive, or even a narrowly tailored means, of achieving a compelling interest of the government.

1. Background

The "modern era" of FCC indecency regulation commenced in 1975, when the FCC ruled that a 2 p.m. radio broadcast of a satiric monologue on contemporary attitudes toward language, entitled "Filthy Words" by the popular comedian George Carlin, was "indecent". *See Pacifica*

Foundation, 56 F.C.C.2d 94 (1975).[1/] The FCC explicitly defined "indecency" in relation to the presence of children in the audience: "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory organs, *when there is a reasonable risk that children may be in the audience*." *Id.* at 98 (emphasis added); *see* Appendix of Petitioner FCC at 41a (hereinafter "Pet. App. ___"). In a clarification, the FCC stated that it "'never intended to place an absolute prohibition on this type of language, but rather *sought to channel it to times of day when children most likely would not be exposed to it*.'" *Pacifica Foundation*, 59 F.C.C.2d 892 (1976) (emphasis added), *quoted in FCC* v. *Pacifica Foundation*, 438 U.S. 726, 733 (1978). The FCC defined children as those under age 12. Pet. App. at 32a-33a.

In *Pacifica*, this Court, in a 5-4 decision, affirmed the FCC's order and found the Carlin Monologue "indecent *as broadcast*." 438 U.S. at 735 (emphasis added). The Court "emphasize[d] the narrowness of [its] holding," *id.* at 750, and noted that its decision was based on "consideration of a host of variables," *id.*, including "[t]he time of day . . . [and] [t]he content of the program [,which] will also affect the composition of the audience," *id.*

Thereafter, the FCC followed a recognized policy of "channeling" "indecent" broadcast speech to the hours after 10 p.m., and of treating as "indecent" speech that involved repetitive use of words similar to those used in Carlin's monologue. Pet. App. 18a, 43a & n.12; *see WGBH Educ. Found.*, 69 F.C.C.2d 1250, 1254-55 (1978); *Pacifica Foundation*, 95 F.C.C.2d 750 (1983).

[1/] The FCC asserts authority to prohibit the broadcast of constitutionally-protected, but "indecent," speech pursuant to 18 U.S.C. § 1464 and 47 U.S.C. §§ 312(a)(6), (b), 503(b)(1)(D).

2. The FCC's "generic" indecency standard

The instant proceeding began with the FCC's April 29, 1987, release of a Public Notice and three orders in which, without prior notice of its intentions, the FCC greatly expanded the scope of speech that it would consider "indecent." *See* Pet. App. 162a-191a.[2/] The FCC stated that it would return to its 1975 definition of "indecent" speech set forth in *Pacifica Foundation*, 56 F.C.C.2d at 98, which would be "actionable when broadcast at times of the day when there is a reasonable risk that children may be in the audience." Pet. App. 182a-183a (internal quotations omitted).

A number of interested parties sought reconsideration and clarification of these orders. In its December 29, 1987, Reconsideration Order, Pet. App. 39a-74a, the FCC refused to modify or to clarify its new "generic definition." *Id.* at 52a. Moreover, it refused to establish a clearly defined "safe harbor" for "indecent" material, merely stating that "after midnight" was its "current thinking." *Id.* at 62a n.47. As the FCC properly recognized, however, this Court in *Pacifica*

> made plain that our authority under Section 1464 is limited to the imposition of reasonable time, place and manner restrictions on the broadcast of indecent material in order to advance the government's interest in protecting children and in enabling parents to determine when and how their children are to be exposed to this material. . . . *we may only do that which is necessary to restrict children's access* to indecent broadcasts; *we may not go further so as to preclude access by adults* who are interested in seeing or hearing such material. . . . [a] reading of

---

[2/] The FCC found that three broadcasters, including respondent Pacifica, had broadcast "indecent" speech under its new generic standard. Pet. App. 162a-191a.

> Section 1464 . . . under which the broadcast of indecent material *would be prohibited altogether would, we believe, run afoul of this constitutional premise.*

Id. at 49a-50a (emphasis added); *see also id.* at 62a n.47.

3. The *ACT I* decision

On review of the Reconsideration Order, the court of appeals affirmed in part and reversed in part. *Action for Children's Television* v. *FCC*, 852 F.2d 1332 (D.C.Cir. 1988) (hereinafter "*ACT I*"); Pet. App. 13a-38a. In *ACT I*, the FCC explicitly acknowledged that its *sole* interest in regulating "indecent" speech is "in protecting unsupervised children from exposure to indecent material; the government does not propose to act *in loco parentis* to deny children's access *contrary to* parents' wishes." Pet. App. 37a (emphasis original). Although the court in *ACT I* recognized that "vagueness is inherent" in the FCC's broad, generic definition of "indecent" speech, *id.* at 38a, it refused to consider the vagueness issue on the merits. Rather, it held that this Court's decision in *Pacifica* foreclosed further inquiry, *id.* at 24a-26a, although this Court's "emphatically narrow holding" in *Pacifica*, *see Sable Communications of California, Inc.* v. *FCC*, 492 U.S. 115, 127 (1989), certainly did not appear to adopt the FCC's generic definition of indecency. The court in *ACT I* also rejected an overbreadth challenge mounted by various parties based on the FCC's failure to recognize serious merit as a constitutionally required defense. Pet. App. 27a-29a.

The court in *ACT I*, however, held that "the precision necessary to allow scope for the first amendment shielded freedom and choice of broadcasters and their audiences cannot be accomplished, we believe, unless the FCC adopts a reasonable safe harbor rule." *Id.* at 36a n.18. The court then remanded the matter to the FCC "for redetermination, *after*

a full and fair hearing, of the times at which indecent material may be broadcast." *Id.* at 38a (emphasis added).[3/]

Following the decision in *ACT I*, Congress adopted a rider to an appropriations bill, known as the "Helms Amendment," which required the FCC to promulgate regulations that would ban the broadcast of "indecent" speech 24 hours a day effective no later than January 31, 1989. Pub. L. No. 100-459, § 608, 102 Stat. 2228 (1988); Pet. App. 75a. The FCC then refused to conduct the "full and fair hearing" mandated in *ACT I*. Pet. App. 76a-77a. Instead, on December 21, 1988, the FCC adopted a rule that "[t]he Commission will enforce . . . Section 1464 . . . on a twenty-four hour a day basis." *Id.* at 75a. Although the Helms Amendment did not so require, the FCC further stated that it "will continue to apply its generic definition of indecency. . . ." *Id.* at 77a.

4. Proceedings in *ACT II*

On January 23, 1989, the court of appeals granted the motion of the petitioners below to stay enforcement of the absolute ban on broadcast indecency, pending full review by that court. *Action for Children's Television* v. *FCC*, No. 88-1916 (D.C. Cir. Jan. 23, 1989) ("*ACT II*"), Joint Appendix filed in No. 88-1916 (D.C. Cir.), at 3 (hereinafter "J.A. ___"). Thus, the 24-hour ban has never gone into effect. While *ACT II* was pending, this Court decided *Sable Communications*, *supra*, in which this Court reaffirmed that "indecent," but not obscene, speech is protected by the First Amendment, and that content-based restrictions on "indecent" speech are subject to

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[3/] The *ACT I* court also criticized the FCC's unexplained decision to raise its definition of "children" from under 12 years to under 18 years and its failure to consider the "predicted audience for the specific radio station in question," rather than "the *total* radio audience," and remanded those issues as well. Pet. App. 32a (emphasis original).

strict judicial scrutiny. 492 U.S. at 126. After *Sable*, the FCC sought to "remand the record" to permit it "to collect data relevant to a judicial determination of the validity of a total ban on broadcast indecency." *ACT II*, Motion for Remand, at 1, 2-3 (filed Aug. 24, 1989), J.A. 6-8. The court granted the motion, and ordered, for the *second* time, that the "FCC *shall conduct a full and fair hearing* on the issue of the propriety of indecent broadcasting . . . ." *ACT II*, Order (D.C.Cir. Sept. 13, 1989), J.A. 4 (emphasis added).

The FCC, however, again chose to ignore the court's order. Instead, the FCC issued a Notice of Inquiry ("NOI") the stated purpose of which was "to allow [the FCC] to compile a record *in support of* Congress' imposition of a 24-hour ban on the broadcast of indecent material." Enforcement of Prohibitions Against Broadcast Indecency, 4 F.C.C. Rcd 8358 (Nov. 20, 1989), J.A. 12 (emphasis added). In the NOI, for the first time in these proceedings, the FCC suggested in a footnote, "an alternative government interest in protecting the public's right to be free from indecent material in the privacy of their homes." *Id.* at 8365 n.10, J.A. 19.

The respondents herein submitted comments to the FCC in which they challenged the total ban and the generic definition on various grounds. They argued, *inter alia*, that numerous important works of art and literature that included "indecent" language, and which have been previously broadcast, particularly on noncommercial radio stations, would be forever banned from the airwaves of this country.[4/] These respondents also showed that small noncommercial radio stations in particular, which focus on an adult audience, and which often engage in innovative, non-mainstream programming, were forced to engage in costly self-censorship because

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[4/] *See* Comments of Pacifica, *et al.*, at 13-20, J.A. 320-27; Comments of PEN, *et al.*, at 4-8, 16-20, J.A. 376-80, 388-92.

they were necessarily left to guess at whether much of their programming fell within the generic definition. As a result, they showed that a 24-hour ban would eliminate a broad range of serious literature, art, music, social commentary on such topics as AIDS and homosexuality, news, and public affairs programming that is unavailable elsewhere.[5/] Pacifica also submitted data showing that the audience of minors for noncommercial radio stations is statistically insignificant.[6/] Other commentors provided undisputed evidence that the vast

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[5/] *See* Pacifica Comments, at 13-20, 25-27, and Attachments 1 & 2, J.A. 320-27, 332-34, 348-60, PEN Comments, at 16-17, J.A. 388-89. For example, many dramatizations of literary works read live on the radio and oral presentations by the authors of such works are not available elsewhere. Under the FCC's broadened indecency standard, Pacifica radio stations have been forced to cancel or heavily edit daytime dramatic readings of contemporary and classic literary works, including, to list only a few, Allen Ginsberg's *Howl*, Alice Walker's *The Color Purple*, James Joyce's *Ulysses* and John Steinbeck's *The Grapes of Wrath*. They have also cancelled or heavily edited the airing of interviews with some of the most controversial and provocative personalities of our times, including Abbie Hoffman, Miles Davis and Dick Gregory, and discussion programs on a range of topics such as AIDS, rape and sexuality for older women. Under a 24-hour ban, virtually none of this programming would be available to the public from any source. Likewise, live news broadcasts, live coverage of public trials and public hearings are not otherwise available. Furthermore, the broadcast medium is an important resource for millions of illiterate Americans and is free of direct costs to the audience.

[6/] Teen listening to public radio accounts for a mere 0.2% of teen listening generally and for virtually no percentage of total radio listening. Pacifica Comments, at 21-25, and Attachment 4, J.A. 328-32, 366-72.

majority of children and teenagers are subject to an opportunity for adult supervision, particularly at night.[7/]

The FCC issued its Report on August 6, 1990, Pet. App. 82a-161a, in which, not surprisingly in light of its self-proclaimed mandate to compile a record in support of its ban, it found that a broadcast ban on constitutionally protected "indecent" speech was proper. The FCC explicitly conceded that its 24-hour ban could withstand constitutional scrutiny only if it served a compelling interest and was "'the least restrictive means to further the articulated interest.'" *Id.* at 91a (quoting *Sable*, 492 U.S. at 126).

The FCC nevertheless asserted that the 24-hour ban met this strict test because of ratings data that showed that *some* teenagers remained in the overall broadcast audience at all times. *Id.* at 129a-131a. This finding, in turn, rested on a redefinition of "children" to include 12-17 year-olds. The *only* data that shows that minors remain in the radio audience after 10 p.m. concerns 12-17 year-olds as an undifferentiated bloc. *See* Pet. at 17; Pet. App. 32a n.16, 111a. Thus, to justify the ban, the FCC had no choice but to change its definition of "children." Furthermore, disregarding its position in *ACT I*, *id.* at 36a-37a, the FCC asserted an independent interest in ensuring that all children and teenagers under eighteen years old are not exposed to any "indecent" speech, regardless of parental opportunity to supervise and regardless of parental wishes, *id.* at 94a-95a & n.22; 121a-122a. In response to the unrefuted evidence that virtually all minors are subject to the opportunity for adult supervision, the FCC took the unprecedented position that, regardless of parental wishes, *the government* would only be satisfied with "active[]" supervision

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[7/] Comments of Action For Children's Television, *et al.*, at 29-34 and Appendix C, J.A. 130-35, 232-50.

"at all times" of minors' viewing and listening habits. *Id.* at 128a.

The FCC also determined that, as an affirmative defense to a charge of indecent broadcasting, broadcasters may show that at the time the challenged broadcast was aired, minors are generally not in the audience in the station's *market area*; it would *not* be a defense to show that minors do not listen to the station at the time of the broadcast. *Id.* at 145a-147a. This determination ignored *ACT I*, which held that the FCC must show, at a minimum, that significant numbers of children are in the audience *of a particular station* at the time it airs an "indecent" broadcast. *Id.* at 32a.

The FCC devoted a mere two perfunctory paragraphs in its 96-paragraph Report to its novel proposition that "preserving the privacy of the home provides an alternative basis for upholding the constitutionality of the 24-hour prohibition." *Id.* at 100a-102a. It did not attempt to reconcile this asserted interest, however, with its provision of an affirmative defense based on the absence of *minors* in the audience.

5. **The *ACT II* decision**

On review, the court below (Mikva, C.J., Edwards and Thomas, J.J.) held that the FCC's blanket prohibition violated the First Amendment. Pet. App. 1a-12a.[8/] The court, after reviewing the record and considering the appropriate standard for restricting constitutionally protected speech under *Sable* and *ACT I*, held that the Constitution precluded the FCC's proposed absolute broadcast ban on constitutionally protected "indecent" speech. *Id.* at 9a-11a. The court further noted that

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[8/] Following the issuance of the Report; the intervenor-respondents herein, all of whom had filed comments with the FCC, sought and were granted leave to intervene and join in the separate brief of The Pacifica Foundation, a petitioner in both *ACT I* and *ACT II*.

nothing in the appropriations rider or the FCC's Report altered the force of the constitutional standards applied in *ACT I* and reiterated by this Court in *Sable*. *Id.* at 10a-11a.[2/] For the *third* time, the court below:

> direct[ed] the Commission, in "redetermin[ing], *after a full and fair hearing*, . . . the times at which indecent material may be broadcast," to carefully review and address the specific concerns we raised in *ACT I*: among them, the appropriate definitions of "children" and "reasonable risk" for channeling purposes, the paucity of station- or program-specific audience data expressed as a percentage of the relevant age group population; and the scope of the government's interest in regulating indecent broadcasts. *See ACT I*, 852 F.2d at 1341-44.

Id. at 12a (emphasis added).

The FCC and intervenor Citizens For Decency Through Law, Inc. (now Children's Legal Foundation, Inc.) sought rehearing and rehearing *en banc*, which requests were denied on August 28, 1991, with no judge of the court requesting the taking of a vote. *Id.* at 192a-193a. The two petitions for certiorari followed. This Court granted respondents' request to file their opposition briefs by January 31, 1992, and to respond to both petitions in each opposition brief.

[2/] The court also followed *ACT I* in rejecting vagueness and overbreadth challenges to the FCC's generic indecency definition. Pet. App. 7a-8a. Given its holding that the 24-hour ban was unconstitutional, the court did not address Pacifica's related argument that, even if the generic definition is not unconstitutionally vague and overbroad when joined with a clear safe harbor, the generic definition could not be sustained under a 24-hour ban on "indecent" speech. *See* Point III, *infra*.

REASONS FOR DENYING THE PETITIONS

The petitioners have failed to set forth any reason to review the unanimous decision of the court below that the FCC's absolute broadcast ban on constitutionally protected speech violates the First Amendment. In two decisions, one stay order, and petitions for rehearing and rehearing *en banc*, not one judge of the court below has stated that such a ban is constitutional. Indeed, prior to passage of the appropriations rider in 1989, the FCC itself explicitly acknowledged that the ban it now defends before this Court is unconstitutional.

The decision below carefully follows the decisions of this Court in *Sable* and *Pacifica*, and breaks no new legal ground. Petitioners do not allege a conflict in the circuits, as none exists. Indeed, the government appears to be most dissatisfied with the brevity of the decision below, demanding this Court's review "to assure that Congress's and the Commission's resolution of the important interests at stake receives more meaningful consideration than the court of appeals gave it." Pet. at 20. The government simply ignores the fact that the court below, after consideration of the record and the arguments, once again remanded the matter to the FCC to consider numerous unresolved issues, including "the scope of the government's interest in regulating indecent broadcasts," after a "full and fair hearing," Pet. App. 12a, which the FCC has steadfastly refused to hold.

Petitioners' complaint that the court below did not explicitly address the government's purported interest in protecting adults in the privacy of the home obscures the fact that the government barely made mention of this argument in its Report, brief, or argument below, and that the FCC itself clearly did not consider this "interest" to be sufficient to justify its absolute ban. Only now, on petition to this Court, has the government for the first time emphasized this argument. The decision of a court of appeals not to address

directly an argument that the government itself chose to downplay, but rather to remand for redetermination after a proper hearing, is no reason for this Court to grant review. In any event, the government's position that it may totally ban any speech from radio or television that it believes some adult Americans might find offensive in order to "preserve the privacy of the home" is a meritless and unprecedented argument that does not justify this Court's review.

The petitioners also provide no reason to review the decision below that the broadcast ban is unnecessary to achieve the government's interest in facilitating parental control of their children. The decision below adheres faithfully to the controlling principles of *Pacifica* and *Sable*, and petitioners are again unable to cite any case that supports the ban. The court of appeals, moreover, reviewed the record and, finding it deficient in numerous respects, remanded for a full and fair hearing at which all of the pertinent issues are to be explored. Review by this Court prior to this hearing would be wasteful of this Court's resources and would present an incomplete record for determination of the constitutional issues.

The court of appeals did not reach the alternative ground for affirmance raised below that, even if a 24-hour broadcast ban were theoretically constitutional, a ban based on the FCC's extraordinarily broad and vague definition of "indecency" could not be sustained. This definition is solely the creation of the FCC, and is not compelled by any act of Congress or by the courts. On remand, therefore, the FCC may choose to pursue a more limited definition. Such a narrowing of the defintion of "indecency" might, in turn, affect the view of the courts on the constitutionality of any regulation ultimately promulgated by the FCC. In the absence of any narrowing, the FCC's generic definition, when combined with a 24-hour ban, would have an *in terrorem* effect on broadcasters that would cause them to remove a broad range

of protected speech from the airwaves out of fear that the FCC might deem such programming "indecent." Indeed, even with time-channeling, the generic definition is so vague that it impermissibly fails to put a reasonable broadcaster on notice of what speech the FCC might find "indecent."[10/]

I. In the court below, the government barely asserted a purported interest in protecting the privacy of the home and certainly made no claim that this interest was an independent compelling interest that could only be served by an absolute broadcast ban on so-called "indecent" speech.[11/] Indeed, the FCC itself has undermined any such claim by its creation of a defense to a charge of indecency when a broadcaster shows that children were not in the broadcast audience in the station's market area at the time of an "indecent" broadcast. Pet. App. at 145a-146a.

The government's petition is based less upon the assertion that the ban is justified by a purported interest in protecting some adults in the privacy of their home than upon the assertion that "the court was obligated to consider all the legitimate justifications for the statute at issue." Pet. at 14. This argument is wrong on several grounds. First, the government provides no citation for the remarkable proposition that the federal courts must directly address on the

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[10/] Respondents herein concur fully in the arguments of respondents Action For Children's Television, *et al.*, that the petitions should be denied because, *inter alia*, the decision below is not final and the matter has been remanded to the FCC for a full and fair hearing of numerous relevant issues, and because this matter will not be reviewed by the full Court as Justice Thomas joined in the decision below.

[11/] In its 50-page brief below, the government devoted one short paragraph to this issue, and argued only that "the asserted interest in protecting the privacy of the home from unwanted indecent broadcasts has received judicial recognition." Gov. Br. at 36. It did not raise the issue at oral argument.

merits every argument presented by the government, no matter how meekly, and that the failure to do so entitles the government to this Court's review. Second, the government simply ignores the fact that the court below gave this argument the consideration it deserved when it ordered the FCC, for the third time, to "redetermin[e], after a full and fair hearing . . . the *scope of the government's interest* in regulating indecent broadcasts." Pet. App. 12a (emphasis added). No law or precedent requires more.

In any event, the government's argument that its asserted interest in protecting objecting adults justifies the absolute broadcast ban is directly contrary to well-settled doctrine of this Court and does not merit review. As the government has expressly conceded, and as this Court has recently reiterated, speech dubbed by the FCC as "indecent but not obscene is protected by the First Amendment." *Sable*, *supra*, 492 U.S. at 126; *see* Pet. App. 88a.[12/] Moreover, the parties are in full

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[12/] In its petition, the government wrongly suggests that "indecent speech is only marginally within the 'outer perimeters of the First Amendment.'" Pet. at 19 (quoting *Barnes* v. *Glen Theatre, Inc.*, ___U.S.___, 111 S.Ct. 2456, 2460 (1991)). In *Barnes*, however, this Court was not referring to broadly-defined generic "indecent" speech, but specifically to nude barroom dancing, which this Court characterized as "expressive conduct" akin to symbolic speech. *Id.* at 2460-61. Having chosen a generic definition of indecency, Pet. App. 77a, which encompasses broad categories of serious core protected speech, the FCC cannot now pretend that it only seeks to ban the broadcast of "nude dancing . . ., adult movies . . ., and sexually explicit messages like those now available in the telephone medium." Pet. at 10. The FCC has never contended, nor could it, that any broadcaster has attempted to broadcast speech of this nature or that broadcasts of this sort led to the imposition of the 24-hour ban. *See* FCC Report, Concurring Statement of Commissioner Quello, at 2 & nn.4 & 5. Rather, the FCC has chosen to punish the broadcast of humorous and satiric songs or banter consisting of sexual innuendo, double entendres, and occasional

(continued...)

agreement that the government may only "regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." *Sable*, 492 U.S. at 126; Pet. App. 88a-89a. Protection of adults from possible momentary exposure to "indecent" speech as defined by the FCC is not a compelling interest and, in any event, an absolute broadcast ban is neither the least restrictive nor even a narrowly tailored means of achieving the asserted interest.

Broadcast speech does not intrude into the home in the same way that speech intrudes upon a truly "captive audience." Thus, there is no compelling interest in protecting adults from possible momentary exposure to such speech. While this Court has recognized the rights of "captive" audiences to be free of unwanted speech, it has only allowed such restrictions "when the 'captive' audience *cannot avoid* the objectionable speech." *Frisby* v. *Schultz*, 487 U.S. 474, 487 (1988) (emphasis added) (individualized residential picketing, where "[t]he resident is figuratively, and perhaps literally, trapped within the home, and . . . is left with no ready means of avoiding the unwanted speech") (emphasis added); *see Lehman* v. *Shaker Heights*, 418 U.S. 298, 307-08 (1974) (public transportation riders); *Kovacs* v. *Cooper*, 336 U.S. 77, 86-87 (1949) (blaring loudspeakers leave residents "practically helpless to escape this interference" with privacy).

This Court, however, has explicitly refused to extend the "captive audience" exception to situations in which the unwilling recipient can readily avoid exposure, including within the privacy of the home. *See, e.g., Bolger* v. *Youngs*

[12/] (...continued)
"dirty" words (not unlike certain passages in Shakespeare's plays), as well as serious dramatic works aimed at adult audiences. *See* Pet. App. 162a-191a; J.A. 714-78.

Drug Products Corp., 463 U.S. 60, 72 (1983); *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U.S. 530, 542 (1980); *Martin* v. *City of Struthers*, 319 U.S. 141, 146-49 (1943); *cf. Cohen* v. *California*, 403 U.S. 14, 21 (1971). Adults who affirmatively invite broadcast speech into their homes are not "captive audiences." They may avoid speech they find offensive, upsetting, or boring with a twist of the dial or by checking TV and radio listings, or by comporting their listening and viewing habits with clear time-channeling rules. The *de minimis* upset experienced by an adult who momentarily tunes into an offensive broadcast can hardly justify the absolute ban that the FCC seeks to impose upon all Americans. *See Rowan* v. *United States Post Office Dep't*, 397 U.S. 728, 737 (1970).

The government primarily relies on a wholly unwarranted reinterpretation of this Court's decision in *Pacifica*. In *Pacifica*, of course, this Court was not presented with a total ban on protected speech. Thus, the Court's brief general discussion of the "individual's right to be left alone" in the home, 438 U.S. at 748, cannot support the much more sweeping *total* ban at issue here. As noted, *supra*, the decision in *Pacifica* was "an emphatically narrow holding," *Sable*, 492 U.S. at 127, which repeatedly emphasized the particular program at issue, the time of the broadcast, and the interest in protecting young children. *Pacifica*, 438 U.S. at 750; *id.* at 760 (Powell, J., concurring). Indeed, the Court in *Sable* explicitly distinguished *Pacifica* by stating, "The FCC rule [in *Pacifica*] was not intended to place an absolute prohibition on the broadcast of this type of language, but rather *sought to channel it* to times of day when children most likely would not be exposed to it. . . . The issue of a total ban was not before the Court." 492 U.S. at 127 (emphasis added, internal quotations omitted). At most, *Pacifica* acknowledged that the pervasiveness of the broadcast media, in conjunction with the presumed presence of children in the audience, permitted

limited regulation in order to channel "offensive" speech to particular times of the day. *Id.* at 757 (Powell, J., concurring). As Justice Powell stated in his concurrence:

> [t]his is not to say, however, that the Commission has an unrestricted license to decide what speech, protected in other media, may be banned from the airwaves in order to protect unwilling adults from momentary exposure to it in their homes.

438 U.S. at 759-60; *see also* Pet. App. at 49a-50a (FCC acknowledges that *Pacifica* prohibits an absolute ban); *Bolger*, 463 U.S. at 72 ("we have never held that the Government itself can shut off the flow of mailings to protect those recipients who might potentially be offended"); *Carey* v. *Population Services Int'l*, 431 U.S. 678, 701 (1977); *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 209 (1975); *Cohen*, 403 U.S. at 21.

There is no reason for this Court to consider the government's unprecedented position that protected broadcast speech may be totally suppressed because it might be offensive to some adults with delicate sensibilities. Coverage of American soldiers dying in a far-off war, criticism of United States policies, public hearings or trials on the alleged sexual conduct of public officials or celebrities, and discussions of critical public health issues such as AIDS may be offensive, indeed shocking, to many. This Court, however, has explicitly warned of the dangers posed by such government censorship:

> The ability of the government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.

Cohen, 403 U.S. at 21.[13/]

II. Petitioners provide no reason for this Court to review the decision of the court below that the government need not as a factual matter, and may not as a matter of law, accomplish its interest in facilitating parental control over their children by "'reduc[ing] the adult population . . . to . . . only what is fit for children.'" *Bolger*, 463 U.S. at 73 (quoting *Butler* v. *Michigan*, 352 U.S. 380, 383 (1957)). The court of appeals' decision finds ample factual support in the record and deviates in no way from well-established law. Moreover, the government is simply wrong in contending that the court below did not consider the record. Its decision makes clear that it found the record insufficient to support the ban and remanded to the FCC to conduct a full and fair hearing on numerous unresolved issues. Pet. App. 12a.

Thus, for instance, the court found inadequate the FCC's almost exclusive reliance on data on the listening and viewing habits of 12-17 year-olds as an undifferentiated bloc, with virtually no data on children under 12 years. *See* Pet. at 17; Pet. App. 111a-121a. In the past, the FCC had focused its attention only on children under age twelve, and it had virtually no evidence that any significant number of children in this age group are in the broadcast audience after 10:00 p.m. As a result, having determined in advance "to compile a record in support of Congress' imposition of a 24-

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[13/] Even were protecting residential privacy a compelling interest here, time-channeling cures any concern about protecting those adults who want to avoid the risk of exposure to indecent material. These adults may check their TV and radio listings before turning on their sets, or, if unsatisfied with anything less than absolute assurance, may simply choose to avoid late night television or radio. Thus, a total broadcast ban that denies every adult in this country access to constitutionally protected speech is not the least restrictive, or even a narrowly tailored, means of serving the government's purported interest.

hour ban," 4 F.C.C.Rcd 8358, J.A. 12, the FCC had no choice but to redefine "children" to include 17 year-olds. The court below, however, refused to accept on this incomplete record the FCC's decision to raise the age of "children" to include high school seniors and college freshmen, and thus remanded to the FCC to "redetermin[e], after a full and fair hearing . . . the appropriate definitions of 'children.'" *Id.* at 12a; *see id.* at 32a-33a (*ACT I*).[14/]

Furthermore, the court of appeals decision comports with settled law and raises no legal issue warranting this Court's review. Neither this Court nor the lower federal courts have ever upheld an absolute content-based ban on constitutionally protected "indecent" speech within an entire medium of expression, in order to protect children or otherwise, and petitioners have presented no reason to revisit that issue here. *See, e.g., Sable*, 492 U.S. 115; *Pacifica*, 438 U.S. at 733 (FCC rule not "intended to place an absolute prohibition on the broadcast of this type of language"); *Bolger, supra*, 463 U.S. 60; *Community Television of Utah, Inc.* v. *Wilkinson*, 611

[14/] High school students clearly have a constitutional right to receive information that the FCC would consider indecent. *See Bolger, supra*, 463 U.S. at 74 n.30; *Erznoznik, supra*, 422 U.S. at 213-14 & n.11. Moreover, high school students are regularly exposed to literary works in their libraries and curricula that clearly fall within the FCC's generic standard. *See* PEN Comments, at 21-22 & n.26, J.A. 393-94. High school age minors also have substantial constitutional and statutory rights that recognize their sexual maturity and knowledge. *See, e.g., Carey, supra*, 431 U.S. at 694-99. Most states, for example, permit teenagers to consent to health services related to pregnancy and for sexually transmitted disease. Indeed, it simply blinks reality to claim that, in this day of explicit AIDS education, high school students are in need of protection by the government, regardless of parental wishes, from the sort of social satire, double-entendre, sexual innuendo, and pop music that the FCC has found indecent. *See* Pet App. 162a-191a; J.A. 714-78.

F.Supp. 1099 (D. Utah 1985), *aff'd*, 800 F.2d 989 (10th Cir. 1986), *aff'd mem.*, 480 U.S. 926 (1987); *Carlin Communications, Inc.* v. *FCC*, 837 F.2d 546 (2d Cir.), *cert. denied*, 488 U.S. 924 (1988); *Cruz* v. *Ferre*, 755 F.2d 1415 (11th Cir. 1985); *cf. City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986) (upholding content-*neutral* regulation of location of adult theatres only because adult theatres are *not* banned altogether); *Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61, 76-77 (1981) (content-neutral ban on all live entertainment in municipality held unconstitutional); *see also* FCC Report, Concurring Statement of Commissioner Quello, at 1 & n.3 (collecting cases), J.A. 78.

The undisputed factual record also demonstrates that virtually all parents have the opportunity to supervise, or to have another adult supervise, their children's viewing or listening activities, particularly at night. Pet. App. 121a-123a; *see* Comments of ACT, at 29-35, and Appendix C, J.A. 130-36, 232-50. Faced with this evidence, the FCC now asserts that it will be satisfied only with "active" parental supervision, Pet. App. 6a, which the FCC defines as "requir[ing] parents either to co-view or co-listen, or to remain actively aware of a child's viewing or listening at all times." *Id.* 128a; *see id.* at 121a-129a. Thus, the government has come full circle from its stated position in *Act I* that "the government does not propose to act *in loco parentis* to deny children's access *contrary to* parents' wishes," *id.* at 37a (emphasis original). Its position before this Court is that parental wishes are irrelevant, and that the government, having determined for itself what is proper parental supervision of all minors under age 18, and having determined that not all parents meet this standard, has decided to eliminate parental choice entirely in this area.

The court below, in determining that the absolute ban was not a precisely drawn response to the government's legitimate interests in protecting children, quite properly

rejected the FCC's unprecedented determination of what constitutes proper parental supervision, and its decision to eliminate parental choice in how they will supervise their children's receipt of constitutionally protected expression. *See id.* at 6a, 9a-11a. As a constitutional matter, the relevant inquiry must be whether parents have *the opportunity* to supervise their minor children, not whether they police their children precisely according to the government's dictates. *See Ginsberg* v. *New York*, 390 U.S. 629, 639 (1968) ("constitutional interpretation has consistently recognized that the parents' claims to authority in their own household to direct the rearing of their children is basic in the structure of our society"); *Cruz*, *supra*, 755 F.2d at 1420 (availability, rather than actual usage of, cable lockboxes sufficient to hold ban on indecent broadcasts on cable television unconstitutional).

As the government forthrightly acknowledged in *ACT I*, its sole legitimate interest in this matter is to facilitate parental supervision of their children, not to replace parents with a broadcast "Big Brother." *See, e.g.*, *Bolger*, 463 U.S. at 73-74; *Ginsberg*, 390 U.S. at 639; *Fabulous Assoc., Inc.* v. *Pennsylvania Publ. Utilities Commission*, 896 F.2d 780, 788 (3d Cir. 1990). The government is not the nation's super-parent, and it has no right to mandate parental behavior in the area of receipt of constitutionally protected speech merely because it would prefer that parents deny to their teenage children material that a majority of FCC commissioners deems "indecent."

The FCC's findings, moreover, are directly contrary to common sense. Parents who really are concerned with and want to protect their children from "indecency" have the opportunity to take whatever steps they deem necessary to prevent their children from watching or listening to programs

they believe are unsuitable.[15/] Indeed, the FCC, in its 1987 Reconsideration Order, found it reasonable after midnight "to rely on parents to exercise increased supervision over whatever children remain in the viewing and listening audience." Pet. App. 62a-63a n.47; *see also Pacifica Foundation* v. *FCC*, 556 F.2d 9, 36 (D.C. Cir. 1977) (Leventhal, J., dissenting) ("children are likely to be in the audience, but are also likely to be under parental control, in the case of those parents who really are concerned with and want to avoid the exposure of their children"), *rev'd*, 438 U.S. 726 (1978). Nothing in the record vitiates the reasonableness of the FCC's prior view.

Finally, the government improperly contends that the adult broadcast audience may be reduced to that which is fit only for children because of the availability of "indecent" speech in other media. Pet. at 19. However, an absolute ban on "indecent" broadcast speech is especially improper precisely because broadcasting is pervasive. Radio and television are undoubtedly the primary means by which large numbers of Americans, especially adults, receive news, information, and entertainment. The FCC simply ignores reality when it asserts that generically defined "indecent" broadcast programming is largely fungible with "indecent" materials in other media.[16/]

[15/] These options include, *inter alia*, co-viewing and co-listening, actually monitoring their children's watching or listening, prohibiting their children's use of television or radio during certain hours, purchasing televisions with channel blocking devices (which are now widely available, *see* Pet. App. 125a n.84), or taking possession of their children's television sets and radios.

[16/] As the record demonstrates, much of the programming which falls within the FCC's broadcast ban is otherwise unavailable to the public. *See* n.5, *supra*. Moreover, the Supreme Court has consistently rejected the argument that a content-based prohibition may be sustained

(continued...)

III. Nothing in the Helms Amendment, or in any decision of the courts, compels the FCC to abide by its broad generic definition of indecency. Should this Court deny the petitions for certiorari, therefore, the FCC on remand will be free (and respondents will urge it) to adopt a definition more narrowly tailored to achieve the government's legitimate purposes. Such a narrowing of the definition might then affect how the courts would view the constitutional issues raised by any rule which the FCC ultimately adopts. Review by this Court now would be premature and may be rendered unnecessary depending on the FCC's and the court of appeals' actions upon remand.

In the court below, respondents argued that the FCC's generic definition of indecency is unconstitutionally vague and overbroad and that, in any event, the 24-hour ban may not be sustained in light of the FCC's inherently vague definition. The court, without further analysis, stated that its holding in *ACT I* "precludes us from now finding the Commission's generic definition of indecency to be unconstitutionally vague." *Id.* at 7a. In light of its ruling that the 24-hour ban could not stand, moreover, it had no need to address respondent's alternative contention that, even if a 24-hour ban were theoretically permissible, it could not be sustained in conjunction with the vague, overbroad definition.

In *ACT I*, the court concluded that this Court's disposition of *Pacifica* precluded it from addressing the question whether the FCC's generic definition of indecency is unconstitutionally vague. Pet. App. 25a-26a. The court noted, however, that "[w]e have upheld the FCC's generic definition

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[16] (...continued)
because of the theoretical availability of an alternative medium of expression. *See, e.g., Bolger*, 463 U.S. at 69 n.18; *Consolidated Edison, supra*, 447 U.S. at 541 n.10 (1980); *Spence* v. *Washington*, 418 U.S. 405, 411 n.4 (1974); *Schneider* v. *State*, 308 U.S. 147, 163 (1939).

of indecency in light of the sole purpose of that definition: to permit the channeling of indecent material, in order to shelter children from exposure to words and phrases their parents regard as inappropriate for them to hear." *Id.* at 29a-30a. Now that the FCC has foregone channeling and has acted to banish "indecent" speech from the airwaves 24 hours a day to "protect" adults as well as minors, however, the underlying premise for the lower court's rejection of overbreadth and vagueness challenges in *ACT I* no longer obtains.[17/]

Whether the generic definition standing alone is unconstitutional, there is no doubt that the definition necessarily leaves broadcasters guessing as to what material they may safely air. Nevertheless, since 1987, the FCC has steadfastly refused to clarify this standard to make it comprehensible to

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[17/] Respondents herein contend, as they did below, that the generic definition is unconstitutionally vague and overbroad, and that this defect provides an alternative basis for affirmance of the decision below in the event *certiorari* were granted. *See Blum* v. *Bacon*, 457 U.S. 132, 137 n.5 (1982); *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979). In *Pacifica*, this Court, in response to an argument that the identical generic definition was unconstitutional because "the Commission's construction of the statutory language broadly encompasses so much constitutionally protected speech," 438 U.S. at 742, stated that this "argument fails because our review is limited to the question whether the Commission has the authority to proscribe this particular broadcast." *Id.* Thus, the Court expressly did not address the constitutionality of the generic definition. *See Carlin Communications, supra,* 837 F.2d at 559 ("The *Pacifica* Court declined to endorse the Commission definition of what was indecent"). Moreover, following this Court's holding in *Pacifica*, the FCC felt compelled to abandon the generic standard for the substantially narrower and more precise definition which it thereafter followed until 1987. *See* Pet. App. 43a. Were this Court to determine that the FCC's definition of indecent speech is itself unconstitutionally vague or overbroad, it need not address the merits of the 24-hour ban at this time.

broadcasters. *See, e.g.*, Pet. App. 52a-54a. The combination of a broad and vague generic definition of indecency and a twenty-four hour ban will not only eliminate from the airwaves all constitutionally protected speech that the FCC deems "indecent," but will inevitably have the *in terrorem* effect of chilling broadcasters from airing substantial amounts of speech of significant merit that the FCC might find *not* "indecent," but which a broadcaster might reasonably fear would be so construed by a majority of the Commissioners of the FCC.

When there is a clearly defined safe harbor, a broadcaster at least has the option of broadcasting potentially "indecent" speech during that time period, and willing adults at least have the option of tuning in at that time.[18/] Thus, the problem of a twenty-four hour ban of generic indecency is not only that great literary works may be deemed "indecent" and therefore banned from the airwaves; the problem is that even if the FCC might ultimately deem such works "decent," no broadcaster, particularly a noncommercial broadcaster with limited resources, will in the first instance dare to air such works at the risk of losing its license or incurring a substantial

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[18/] Respondents do not concede that such a solution is constitutional. An unconstitutionally vague or overbroad law should not be upheld simply because it does not apply everywhere and at every time. Rather, vagueness doctrine requires that prohibitions on speech be defined "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983); *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982); *Smith* v. *Goguen*, 415 U.S. 566, 574 (1974); *see also Houston* v. *Hill*, 482 U.S. 451, 465-67 (1987) (overbroad law "accords the police unconstitutional discretion in enforcement"). The FCC's generic definition fails both tests.

financial penalty.[19/] As this Court has consistently recognized, one of the worst vices of both overbroad and vague rules is their tendency to chill or deter constitutionally protected speech. *See, e.g., Secretary of State* v. *J.H. Munson Co.*, 467 U.S. 947, 958 (1984); *Hynes* v. *Mayor of Oradell*, 425 U.S. 610, 620 (1976); *Baggett* v. *Bullitt*, 377 U.S. 360 (1964). Indeed, "[f]ar from providing the 'breathing space' that 'First Amendment freedoms need . . . to survive,'" *Houston* v. *Hill*, 482 U.S. 451, 467 (1987) (quoting *NAACP* v. *Button*, 371 U.S. 415, 433 (1963)), the generic definition, combined with the 24-hour broadcast ban, will deprive the American people of important and valuable speech not available in any other medium of expression.

[19/] *See* 47 U.S.C. § 503(b)(1)(D), (2)(A) (penalties of up to $25,000 per violation of 18 U.S.C. § 1464); *id.* § 312(a)(6) (revocation of a station license for violation of section 1464). These are not merely hypothetical concerns, as the Comments of Pacifica, at 13-20 and Attachments 1 & 2, J.A. 320-27, 332-34, 348-60, show with regard to such literary classics as *Ulysses*, *The Grapes of Wrath*, and *Howl*. *See* n.5, *supra*.

CONCLUSION

For the reasons stated herein, the petitions for writs of certiorari should be denied.

Dated: New York, New York
January 31, 1992

Respectfully submitted,

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Nos. 91-883 & 91-952

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IN THE

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OCTOBER TERM, 1991

CHILDREN'S LEGAL FOUNDATION, INC. and AMERICAN FAMILY ASSOCIATION, INC.,
Petitioners,

v.

ACTION FOR CHILDREN'S TELEVISION, *et al.*,
Respondents.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,
Petitioners,

v.

ACTION FOR CHILDREN'S TELEVISION, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTIONS PRESENTED

1. Whether the government can, consistently with the First Amendment and with this Court's decisions in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), and *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989), completely ban material that is deemed indecent—but not obscene—from radio and television.

2. Whether the "Helms Amendment," Pub. L. No. 100-459, § 608, 102 Stat. 2228 (1988), is constitutional under the First Amendment.

PARTIES TO THE PROCEEDINGS

The respondents on this brief are Action For Children's Television; American Civil Liberties Union; Association of Independent Television Stations, Inc.; CBS, Inc.; Infinity Broadcasting Corporation; Capital Cities/ABC, Inc.; Motion Picture Association of America, Inc.; National Association of Broadcasters; National Broadcasting Company, Inc.; National Public Radio; People For The American Way; Post-Newsweek Stations, Inc.; Public Broadcasting Service; Radio-Television News Directors Association; The Reporters Committee for Freedom of the Press; and Society of Professional Journalists.

Pursuant to this Court's Rule 29.1, following are the parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates of these respondents that are corporations:

Respondent Capital Cities/ABC, Inc. is affiliated with In-Store Advertising, Inc. and with Cellular Communications, Inc. Berkshire Hathaway, Inc. owns a minority of the stock of Capital Cities/ABC, Inc.

Loew's Corporation owns a minority of the stock of respondent, CBS, Inc.

Respondent National Broadcasting Company, Inc. ("NBC") is a wholly-owned subsidiary of National Broadcasting Company Holding, Inc., which is a wholly-owned subsidiary of General Electric Company. A wholly-owned subsidiary of NBC, NBC Cable Holding, Inc., owns a number of wholly-owned subsidiaries each of which has an interest in a number of cable-related companies, with the remaining interest in such companies being owned by unrelated companies. A wholly-owned subsidiary of NBC, NBC News Overseas, Inc., has a 37.5% interest in Visnews, Limited, with the other 62.5% interest being held by Reuters Limited and British Broadcasting Corporation. NBC has an 81.25% interest in Mobile Image Limited, a U.K. Company.

Respondent Post-Newsweek Stations, Inc. is a wholly-owned subsidiary of the Washington Post Company. The Washington Post Company has the following affiliates: Bear Island Paper Co.; Bowater Mersey Paper Co. Ltd.; International Herald Tribune, S.A.; Los Angeles Times/Washington Post News Service; Bear Island Timberlands Co.; Cowles Media Co.; Tayside Cable Systems Limited; Kingdom Cablevision Limited; and American PSC L.P.

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IN THE

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OCTOBER TERM, 1991

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On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENTS ACTION FOR CHILDREN'S TELEVISION, *et al.* IN OPPOSITION

STATEMENT

At issue in this case in an order of the Federal Communications Commission ("Commission" or "FCC") imposing a complete ban on broadcast material that the FCC considers to be indecent, but not obscene. This blanket ban, which reversed long-standing Commission policy, was mandated by a federal statute known as the

"Helms Amendment."[1] Included within the definition of indecency is material that may be considered offensive or sexually suggestive but is clearly not obscene because it does not appeal to the prurient interest and because it has serious literary, artistic, political, or scientific merit. The background of that statute and the earlier proceedings are summarized below.[2]

From time to time in the past the Commission has sought to restrict the broadcast of "indecent" material under 18 U.S.C. § 1464 (1988).[3] Beginning in the 1970's, the Commission began to focus its attention on programs

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[1] Making Appropriations for the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies for the Fiscal Year Ending September 30, 1989 and for Other Purposes, Pub. L. No. 100-459, § 608, 102 Stat. 2228 (1988).

[2] All citations to "Pet. App." refer to the Appendix to the Petition filed by the government in No. 91-952. A copy of the two-volume Joint Appendix that was filed with the court of appeals has been lodged with the Clerk of this Court. Citations to that joint appendix are designated "J.A."

[3] That statute subjects persons who "utter[] any obscene, indecent, or profane language by means of radio communication" to a fine of not more than $10,000 or imprisonment for up to two years, or both.

Pursuant to this statute, the Commission, in the 1930's, investigated a radio station that had broadcast an NBC Blue Network presentation of Eugene O'Neill's 1920 Pulitzer Prize-winning play "Beyond The Horizon." *See* H.P. Warner, *Radio and Television Law* § 34a, at 339 (1948). Subsequently, the Commission investigated both CBS and the NBC Blue Network for transmitting suggestive Spanish songs during the Spanish Civil War. *Id.* at 337. In the 1960's, the Commission refused to renew a radio station license belonging to the late Edward G. Robinson, Jr., finding that the station had broadcast programs that contained sexual innuendo and were "coarse, vulgar, suggestive, and susceptible of indecent, double meaning," even though they were not obscene. *Robinson v. FCC*, 334 F.2d 534, 535 (D.C. Cir.) (per curiam) (affirming on alternative ground to avoid constitutional question as to program censorship), *cert. denied*, 379 U.S. 843 (1964).

involving repeated use of what have become known as the "seven dirty words." In 1978, in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), this Court narrowly affirmed the Commission's ruling that George Carlin's "Filthy Words" monologue was indecent, and that a radio broadcast of that monologue at 2 p.m. on a Tuesday afternoon violated 18 U.S.C. § 1464. A sharply divided Court "emphasize[d] the narrowness of [its] holding." 438 U.S. at 750. Thereafter, the FCC permitted broadcasters to channel broadcasts that included so-called indecent material to a safe harbor period after 10 p.m.,[4] and for the next decade indecency regulation was limited to material involving repetitive use of the so-called "seven dirty words"—the situation involved in *Pacifica* itself.[5]

In 1987, the Commission *sua sponte* released a Public Notice, abruptly altering its regulatory course. *See New Indecency Enforcement Standards To Be Applied To All Broadcast and Amateur Radio Licensees*, 62 Rad. Reg. 2d (P&F) 1218 (1987) ("Public Notice"). In this Public Notice, the Commission substantially expanded its regulation of indecency, stating that it would no longer limit its indecency enforcement to the type of material at issue in *Pacifica*. Instead, it stated that it would consider to be "indecent" and subject to regulation any "language or material that depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." *Id.* at 1219.

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[4] *See New Indecency Enforcement Standards To Be Applied to All Broadcast and Amateur Radio Licensees*, Public Notice 87-153, 62 Rad. Reg. 2d (P&F) 1218, 1219-20 (1987) (describing prior policy).

[5] *See In re Pacifica Foundation*, 95 F.C.C. 2d 750 (1983) (finding morning announcer's use of several of "seven dirty words" not to be indecent); *WGBH Educational Foundation*, 69 F.C.C. 2d 1250, 1251 (1978) (finding television broadcasts dealing with "scatology, immodesty, vulgarity, nudity, profanity, and sacrilege" not to be indecent). *See also Decency in Broadcasting, Inc.*, 94 F.C.C. 2d 1162 (1983).

The Public Notice and subsequent cases suggested that enforcement under this standard would encompass a range of material, including news,[6] informational programs,[7] political advertising,[8] presentations of serious drama,[9] motion pictures,[10] dramatizations of serious works of literature,[11] satirical material,[12] and recordings by popular musicians.[13] Although the Commission noted that "consideration of context is critical in *all* indecency cases," it refused to "single [serious merit] out for greater weight or attention" in the determination of whether material is indecent, or to exempt news and public affairs

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[6] KSD-FM, Notice of Apparent Liability (October 29, 1990), J.A. 737; *In re Infinity Broadcasting Corp. of Pennsylvania*, 3 F.C.C. Rcd. 930, 937 n.31 (1987), *vacated in part and remanded sub nom. Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988).

[7] *See, e.g.*, Letter to Mr. and Mrs. Roland Orle from Chief, Mass Media Bureau (Apr. 7, 1988), J.A. 784.

[8] *See, e.g.*, Letter to Hon. John E. Bourne, Jr. from Chief, Mass Media Bureau (Apr. 7, 1988), J.A. 729.

[9] *See, e.g., In re Pacifica Foundation, Inc.*, 2 F.C.C. Rcd. 2698, *reconsideration and clarification granted in part, denied in part sub nom. Infinity Broadcasting Corp. of Pennsylvania*, 3 F.C.C. Rcd. 930 (1987).

[10] *See, e.g., Kansas City Television, Ltd.*, Order, FCC 88-274, 4 F.C.C. Rcd. 7653 (Aug. 5, 1988).

[11] *See, e.g.*, Letter to Thomas Byrne from Chief, Mass Media Bureau (Apr. 7, 1988), J.A. 781.

[12] *See, e.g., In re Infinity Broadcasting Corp. of Pennsylvania*, 2 F.C.C. Rcd. 2705, *reconsideration and clarification granted in part and denied in part*, 3 F.C.C. Rcd. 930 (1987).

[13] *See, e.g.*, KLUC-FM, Notice of Apparent Liability (Oct. 26, 1989), J.A. 734. The Commission did not in each of these cases (nn. 6-13) find the particular material to be indecent, but it did make clear that these types of programs are not exempt from its indecency regulation.

programming from the broad reach of the new standard.[14] In addition, the Commission in its Public Notice stated that the ban would apply to any time of day when there was a "reasonable risk" of "children" (defined by the Commission to include children and teenagers up to the age of 17) in the audience. Public Notice at 1219.[15]

Multiple petitions for reconsideration were filed on two grounds relevant here. First, the petitions urged that the Commission's indecency standard was unconstitutionally vague. *See* Reconsideration Order, Pet. App. 46a. Second, because some children and teenagers might always be in the overall audience, the petitions urged that the Commission's approach had effectively banned at all hours broadcasts that the Commission considered to be indecent, and that the Commission was obligated to adopt a safe harbor when adults could have the opportunity to see and hear such materials. *Id.*

In its December 29, 1987, Order on Reconsideration, the Commission rejected the vagueness challenge, but agreed that it was constitutionally prohibited from imposing a blanket ban and that it was obligated to create a safe harbor. *See* Reconsideration Order, Pet. App. 39a.[16] It stated that 12:00 midnight was its "current

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[14] *In re Infinity Broadcasting Corp.*, 3 F.C.C. Rcd. 930, 932, 937 & n.28 (1987) (emphasis in original).

[15] On the same day it issued the Public Notice, the Commission released three decisions, each of which declared "indecent" material that would not have been so identified under the Commission's earlier standard; two of the three broadcasts at issue in the decisions occurred after 10 p.m. No sanctions were issued in these matters because of the acknowledged change in Commission policy. *In re Infinity Broadcasting Corp. of Pennsylvania*, 2 F.C.C. Rcd. 2705 (1987); *In re Pacifica Foundation, Inc.*, 2 F.C.C. Rcd. 2698 (1987); *In re Regents of the University of California*, 2 F.C.C. Rcd. 2703 (1987).

[16] Some petitions, including one filed by Morality in Media, had urged that the Commission explicitly impose a blanket ban. The

thinking" as to when the risk of children and teenagers in the broadcast audience could reasonably be thought minimized, explaining that it "is late enough . . . to rely on parents to exercise increased supervision over whatever children remain in the viewing and listening audience." *Id.* at 62a-63a n.47. The Commission made clear that the safe harbor was designed to "advanc[e] the government interest in safeguarding children from [indecent material] so as to enable parents to decide effectively what material of this kind their children will see or hear." *Id.* at 48a. The Commission further stated that, to be "consistent with . . . constitutional principles," it could not "preclude access by adults [to indecent materials]." *Id.* at 49a-50a.

On review, the District of Columbia Circuit (Judges Robinson, R.B. Ginsburg, and Sentelle) affirmed in part and reversed in part. *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) (*ACT I*) (Pet. App. 13a-38a). The court of appeals conceded that "vagueness is inherent" in the Commission's definition of indecency (Pet. App. 38a), but held that it was precluded from ruling that the standard is unconstitutionally vague under this Court's decision in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

However, the court of appeals agreed with respondents that it was necessary for the FCC to adopt "a reasonable safe harbor rule" to permit "the precision necessary to allow scope for the first amendment shielded freedom and choice of broadcasters and their audiences." Pet. App. 35a-36a n.18. Citing the statements of the FCC's General Counsel at oral argument, the court reasoned that "the government's role is to facilitate parental supervision of children's listening," and "[t]hus, the FCC must endeavor to determine what channeling rule will

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FCC rejected this request on the ground that it would "run afoul of [the] constitutional premise. . . ." Reconsideration Order, 3 F.C.C. Rcd. at 931, Pet. App. 50a.

most effectively promote parental—as distinguished from government—control." *Id.* at 37a. The court agreed that the Commission's new safe harbor period of midnight to 6 a.m. was both arbitrary and too limited. The court concluded that the Commission's findings in this respect were "more ritual than real" and the underlying evidence on which it relied "insubstantial." *Id.* at 32a. The court therefore remanded the case to the Commission, directing it to conduct a "full and fair hearing" on the safe harbor hours.[17] *Id.* at 38a.

Before the Commission had an opportunity to conduct the hearing, Congress adopted a rider to appropriations legislation, known as "the Helms Amendment," which required the FCC to promulgate regulations imposing a 24-hour-a-day ban on indecent speech.[18] Thereafter, the Commission declined to comply with the notice and comment required by the District of Columbia Circuit's remand order, stating that to do so would be futile because its "task in promulgating the rule is purely ministerial and leaves no room for discretion." Pet. App. 78a. Accordingly, the Commission adopted a new rule banning all broadcasts of any material deemed to be indecent, no matter the time of day. *Id.* at 77a.

Respondents sought a stay on the ground that the new statute and revised policy were unconstitutional, and a panel of the District of Columbia Circuit (Judges Mikva, R.B. Ginsburg, and Silberman) unanimously stayed the

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[17] The court also directed the Commission to address the inclusion of teens aged 12-17 in the definition of children and what constitutes a "reasonable risk" that children may be exposed to indecent materials.

[18] The Helms Amendment provided that:

> By January 31, 1989, the Federal Communications Commission shall promulgate regulations in accordance with section 1464, title 18, United States Code, to enforce the provisions of such section on a 24 hour per day basis.

Pub. L. No. 100-459, § 608, 102 Stat. 2228 (1988).

order. *Action for Children's Television v. FCC*, No. 88-1916, Order (D.C. Cir. Jan. 23, 1989), J.A. 3. While the stay was in effect pending review, this Court held that a blanket ban on indecent telephone message services violated the First Amendment. *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989). There, this Court found "quite unpersuasive" the government's argument that a blanket ban was necessary because "nothing less could prevent children from gaining access to such messages." *Id.* at 128. The Court concluded that a blanket ban could not be justified even if "a few of the most enterprising and disobedient young people would manage to secure access to such messages." *Id.* at 130.

The FCC thereafter sought a remand of the record in the present case to allow it to "collect data relevant to a judicial determination of the validity of a total ban on broadcast indecency." Motion for Remand (filed Aug. 24, 1989). The District of Columbia Circuit granted the motion "in light of the Supreme Court's recent decision in *Sable Communications of California v. FCC*," and directed the FCC to "conduct a full and fair hearing on the issue of the propriety of indecent broadcasting." *Action for Children's Television v. FCC*, No. 88-1916, Order (D.C. Cir. Sept. 13, 1989), J.A. 4.

Rather than hold such a hearing, the FCC announced that it would instead "compile a record in support of Congress' imposition of a 24-hour ban on the broadcast of indecent material." *See* Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464, MM Docket 89-494, Notice of Inquiry, FCC 89-307 (Nov. 20, 1989), J.A. 12. The comments received by the FCC demonstrated that the Commission's indecency regulation reaches a broad range of valuable, protected speech which to a great extent is unavailable elsewhere.[19] The

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[19] *See, e.g.*, pp. 4-5 *supra*; p. 16 n.32 *infra*; Comments of the Pacifica Foundation, *et al.* (filed Feb. 20, 1990), J.A. 321-324; Com-

majority of formal comments filed with the Commission also opposed a blanket ban on broadcast indecency, on the grounds that a ban impermissibly interferes with broadcasters' programming decisions and denies adults access to broadcasts that may contain such material, thereby reducing adults to seeing and hearing only what is fit for children.[20] In addition, these comments pointed to the absence of any showing of harm to children and presented uncontroverted evidence that parents or other adults are in fact present with virtually all children for large periods of the day, including the evening hours that the FCC itself had previously sanctioned as a safe harbor, making channeling a less restrictive means of furthering the government's interest in assisting parents to supervise their children.[21] Even comments favoring government regulation of indecent speech questioned the constitutionality of a blanket ban.[22]

The Commission also received comments in support of the blanket ban, which claimed that the government has a compelling interest in shielding both children and adults from indecency,[23] that children have broad access to televisions and radios,[24] and that it is impractical for "already harried parents" to supervise their children's

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ments of P.E.N. American Center, *et al.* (filed Feb. 20, 1990), J.A. 388-392; Comments of Cohn and Marks at 16-20 (filed Feb. 21, 1990).

[20] *See, e.g.*, Comments of Action for Children's Television, *et al.* ("ACT") (filed Feb. 20, 1990), J.A. 105-113, 136-141.

[21] *See* Comments of ACT, J.A. 114-119.

[22] *See* Comments of the U.S. Catholic Conference (filed Feb. 20, 1990), J.A. 401.

[23] *See* Reply Comments of Morality in Media, Inc. (filed Jan. 18, 1990), J.A. 459-474.

[24] *See* Comments of American Family Association, Inc., *et al.* at 15-18 (filed Feb. 21, 1990).

listening and viewing.[25] These commenters presented no evidence contradicting respondents' showing that parents or other adults were with their children for large portions of the day, and thus able to exercise control over their children's viewing and listening if they wished to do so.

On August 6, 1990, the Commission issued its Report in support of its prior conclusion that a complete ban on broadcast indecency was justified. Pet. App. 82a-151a. The Report claimed that the government has an independent interest in shielding children and teenagers from broadcast material the Commission considers indecent, regardless of whether parents have the opportunity to supervise their children. *Id.* at 94a-96a & n.22; 121a-122a. The Report also asserted that a complete ban on broadcast indecency "is the most narrowly tailored means of protecting children from indecent material" (*id.* at 147a), because "at all times there is a reasonable risk that significant numbers of children are in the broadcast audience" who are without "effective" or "meaningful parental supervision." *Id.* at 132a-134a. The Report did not take issue with respondents' showing as to the opportunities for adult supervision. To the Commission, "parents can effectively supervise their children only by co-viewing or co-listening, or, at a minimum, by remaining actively aware of what their children are watching at all times." *Id.* at 126a.

As an apparent afterthought, the Report claimed that while the Commission had focused on protecting children, "preserving the privacy of the home provides an alternative basis for upholding the constitutionality of the 24-hour prohibition." *Id.* at 100a. The Report referred to this basis in passing in just six of its 96 paragraphs (*id.* at 93a, 94a, 100a, 102a, 109a, 144a), and did not rely on it in concluding that a blanket ban was appropriate. *Id.* at 147a.

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[25] *Id.* at 42.

On review, the District of Columbia Circuit (Chief Judge Mikva, Judge Edwards and then-Judge Thomas) held that the blanket ban could not withstand constitutional scrutiny. The court restated the standards previously set forth in *ACT I*: indecent—but not obscene—broadcast material is protected by the First Amendment; any restrictions on such material must serve a compelling state interest and must be precisely drawn; and the government's compelling interest in "safeguarding the physical and psychological well-being of a minor . . . may be served only by a carefully-tailored regulation." Pet. App. 9a. To the court, nothing in the nearly three years since *ACT I* was decided had altered its "precedential force." Pet. App. 10a. Accordingly, the court of appeals again held that it was constitutionally necessary for the FCC to adopt some period of the day to serve as a safe harbor.[26]

The court of appeals remanded the case to the FCC for a full and fair hearing that would address a less-than-wholesale ban on broadcast indecency. The government and Children's Legal Foundation and American Family Association, Inc. sought rehearing, which was denied.[27] Pet. App. 192a. Their Suggestions for Rehearing *En*

[26] In response to the challenge to the Commission's definition of indecency, the court of appeals stated that it was precluded by *ACT I* from finding the definition to be unconstitutionally vague. Pet. App. 7a. The court in *ACT I* had believed itself constrained from finding that definition of indecency to be unconstitutionally vague based on this Court's holding in *Pacifica*. *Id.* at 26a. *See supra* at p. 6.

The court also directed the Commission to review carefully and address "the appropriate definitions of 'children' and 'reasonable risk' for channeling purposes, the paucity of station- or program-specific audience data expressed as a percentage of the relevant age group population, and the scope of the government's interest in regulating indecent broadcasts." Pet. App. 12a.

[27] Petitioners Children's Legal Foundation and American Family Association, Inc. will be referred to as "CLF" and their petition cited as "CLF Pet."

Banc were also denied, and no member of the District of Columbia Circuit requested that a vote on the Suggestions be taken. Pet. App. 193a. The Commission did not hold a hearing. The petitions for certiorari followed.

REASONS FOR DENYING THE WRIT

Petitioners have shown no basis for granting certiorari in this case. The conclusion reflected in the decision below—that a blanket ban on broadcast indecency is unconstitutional—was endorsed by three separate panels of the court of appeals, consisting of seven individual judges.[28] There was not a single dissent, and no judge of the court of appeals voted for rehearing en banc when the government urged the same arguments that it now presents to this Court. Pet. App. 192a-193a. Petitioners do not allege a conflict among the circuits, and, because the court of appeals remanded the matter to the FCC for further factfinding, the case lacks finality. Most significant, the decision below, far from departing from this Court's decisions, faithfully implements them, including particularly this Court's decisions in *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989), and *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). Certiorari should be denied.

1. The government concedes that indecent—but not obscene—speech is protected by the First Amendment.[29]

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[28] The stay panel evidently agreed with the two merits panels that the regulation and the statute on which it is based were unconstitutional. *See Action for Children's Television v. FCC*, No. 88-1916, Order (D.C. Cir. Jan. 23, 1989), J.A. 3.

[29] In fact, in a separate indecency case involving telephone message services, the government, in successfully opposing a petition for certiorari, acknowledged that due to its protected status indecent speech may be regulated only if there is a compelling state interest. Brief for United States in Opposition at 8, *Dial Information Services Corp. v. Barr*, No. 91-697 (cert. denied Jan. 27, 1992) ("Dial Br."). The government there claimed only that "protecting the physical and psychological well-being of minors" is such an inter-

This well-established principle was recently reaffirmed in *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989), where this Court specifically held that "sexual expression which is indecent but not obscene is protected by the First Amendment." *Id.* at 126. Despite this central concession, the government, along with petitioners Children's Legal Foundation and American Family Association, Inc., claim a grant of certiorari is warranted because the court of appeals did not give proper weight to the governmental "interest in protecting the adult listener from intrusion in . . . the privacy of the home." Gov't Pet. 13. *See also* CLF Pet. 24-26.

The petition for certiorari represents a complete reversal of the Commission's prior position on this issue. Less than five years ago, the Commission refused to impose a blanket ban on the broadcast of indecent material. To the Commission, a complete prohibition would "run afoul of [the] constitutional premise" that the Commission "may only do that which is necessary to restrict children's access to indecent broadcasts" and "may not go further so as to preclude access by adults who are interested in seeing or hearing such material." Reconsideration Order, Pet. App. 49a-50a (quoted in *ACT II*, Pet. App. 11a).

The government has established no basis for granting certiorari to consider whether it may impose a blanket

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est, *id.*, and did not assert any sort of interest in "protecting" adults.

Neither *Pacifica* nor any other decision of this Court supports the suggestion of CLF (CLF Pet. 10-12) that indecent speech can be entirely excluded from the airwaves as a nuisance unprotected by the First Amendment. Indeed, the opinions in *Pacifica* said just the opposite. *See, e.g., Pacifica*, 438 U.S. at 750 (plurality opinion) (decision to regulate the Carlin monologue was based on "context," including the time of day at which it was broadcast); *id.* at 763 (Brennan, J., dissenting) (observing that "all members of the Court agree that the Carlin monologue aired by station WBAI does not fall within one of the categories of speech, such as 'fighting words,' . . . or obscenity, . . . that is totally without First Amendment protection") (citations omitted).

ban on so-called "indecent broadcasts" in order to protect adults from such material. In this respect, the decision below is not alleged to conflict with any decisions of the other courts of appeals. Indeed, every court that has considered the question has unhesitatingly agreed that blanket bans on speech, whether involving print, cable, telephone, or broadcast, violate the First Amendment.[30] Nor is there any conflict with this Court's precedents. This Court has firmly established that the government cannot "reduce the adult population" to seeing or hearing "only what is fit for children." *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

This continues to be the controlling principle. In *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), the Court rejected the government's argument that a blanket ban on unsolicited mailings of contraceptive advertisements was constitutional because it was designed to protect the privacy of the home. While individuals may wish to restrict what enters their home, the Court stated, "we have never held that the Government itself can shut off the flow of mailings to protect those recipients who might potentially be offended." *Id.* at 72.

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[30] *See, e.g., Sable*, 492 U.S. at 127 (telephone); *Wilkinson v. Jones*, 480 U.S. 926 (1987) (mem.), *aff'g*, 800 F.2d 989 (10th Cir. 1986) (per curiam), *aff'g sub nom. Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099 (D. Utah 1985) (cable); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983) (mail); *Butler v. Michigan*, 352 U.S. 380 (1957) (print); *ACT I*, 852 F.2d at 1343 n.18 (broadcasting); *Carlin Communications, Inc. v. FCC*, 837 F.2d 546 (2d Cir.), *cert. denied*, 488 U.S. 924 (1988) (telephone); *Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985) (cable); *American Booksellers Ass'n v. Webb*, 643 F. Supp. 1546 (N.D. Ga. 1986), *rev'd on other grounds*, 919 F.2d 1493 (11th Cir. 1991) (print); *Rushia v. Town of Ashburnham*, 582 F. Supp. 900 (D. Mass. 1983) (print); *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164 (D. Utah 1982) (cable); *American Booksellers Ass'n v. McAuliffe*, 533 F. Supp. 50 (N.D. Ga. 1981) (print); *Home Box Office, Inc. v. Wilkinson*, 531 F. Supp. 987 (D. Utah 1982) (cable); *Tattered Cover, Inc. v. Tooley*, 696 P.2d 780 (Colo. 1985) (en banc) (print).

This rule is equally applicable to broadcasting. In upholding a Commission order premised on the presence of children in the listening audience, the Court in *Pacifica* rejected the notion that an interest in protecting adults from indecency would justify a blanket ban in the broadcast medium. The Court made clear that the restrictions at issue there did "not by any means reduce adults to hearing only what is fit for children." 438 U.S. at 750 n.28 (citing *Butler v. Michigan*, 352 U.S. at 383). Justice Powell re-emphasized this point in his decisive concurrence, stating that the Commission does not have "an unrestricted license to decide what speech, protected in other media, may be banned from the airwaves in order to protect unwilling adults from momentary exposure to it in their homes." 438 U.S. at 759-60.[31]

The Court recently reaffirmed this principle. In *Sable Communications*, the Court held unconstitutional a blanket ban on indecent speech involving telephone message services. Unlike the channeling in *Pacifica*, the Court stated, the ban in *Sable* was a "denial of adult access" and therefore unconstitutional, because it restricted adults to seeing and listening to "only what is fit for children". 492 U.S. at 128, 131 (internal quotations omitted). In acknowledging that broadcasting's " 'unique' attributes" may warrant limited restrictions on indecent speech that would be impermissible for other media, *Sable*, 492 U.S. at 127-128, the Court made no suggestion that a blanket ban in broadcasting would be constitutionally acceptable. To the contrary, the Court reemphasized the "narrowness" of its

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[31] While *Pacifica* itself made clear that a blanket ban designed to protect adult listeners would be unconstitutional, later decisions of this Court emphasize that an adult privacy interest would not even support channeling regulations. In *Bolger v. Youngs Drug Products, Corp.*, the Court expressly rejected protection of adults as a sufficient governmental interest, stating that such an interest "carries little weight." 463 U.S. at 71. Continuing, the Court emphasized that it was "the government's interest in protecting the young" that justified the restriction at issue in *Pacifica*. *Id.* at 74.

holding in *Pacifica*, which permitted only channeling—but not an absolute prohibition—of indecency in broadcasting.[32] There is therefore no basis for the assertion that "protecting" adults justifies a total ban on speech that falls within the First Amendment.[33]

2. The government and CLF also claim that this Court should grant certiorari to determine whether, on the facts of this case, anything other than a blanket ban on inde-

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[32] The availability of some indecent materials in other media (Gov't Pet. 19-20) has no bearing on the permissibility of the blanket ban. *See, e.g., Bolger*, 463 U.S. at 69-70 n.18; *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 n.15 (1976); *Spence v. Washington*, 418 U.S. 405, 411 n.4 (1974) (per curiam); *Schneider v. State*, 308 U.S. 147, 163 (1939). Moreover, contrary to the assertions of petitioners (Gov't Pet. 19-20; CLF Pet. 28), large quantities of broadcast material—such as live radio or television talk shows, coverage of breaking news stories, live broadcasts, special news reports, public affairs programs, and many made-for-television entertainment programs—simply are not available elsewhere. Of the broadcast programs that were the subjects of sixteen Notices of Apparent Liability and Letters of Inquiry issued in 1989 and 1990 on indecency grounds, at least eleven contained material that was unavailable in any other medium. *See, e.g.*, WFBQ-FM, Notice of Apparent Liability (Oct. 29, 1990), J.A. 743; KSJO, Notice of Apparent Liability (June 26, 1990), J.A. 740; WMMQ-FM, Letter of Inquiry (June 14, 1990) J.A. 757; WVIC-FM, Letter of Inquiry (June 1, 1990), J.A. 761.

[33] Nor does the Court's decision in *Barnes v. Glen Theatre, Inc.*, 111 S.Ct. 2456 (1991), provide support for a blanket ban. There, the state sought to ban nude dancing under a statute prohibiting public nudity. Unlike the blanket ban on protected speech here, the statute in *Barnes* addressed conduct, and had only an incidental effect on constitutionally-protected expression. *See* 111 S.Ct. at 2461 (plurality opinion); *id.* at 2463 (Scalia, J. concurring); *id.* at 2468 (Souter, J. concurring). Moreover, the decisive vote of Justice Souter in *Barnes* turned on the adverse secondary effects of nude barroom dancing, *id.* at 2468-2469; there are no secondary effects that are claimed to support the blanket ban at issue here.

The government's reliance on *Frisby v. Schultz*, 487 U.S. 474 (1988), is similarly misplaced. The prohibition on residential picketing at issue there was a content-neutral time, place, and manner regulation. Here, in contrast, the ban is content-specific. *See Boos v. Barry*, 485 U.S. 312, 319-321 (1988).

cent broadcasts would enable parents to supervise children. Gov't Pet. 10; CLF Pet. 28. Certiorari is not appropriate simply to determine whether the court below reached the correct result on the facts of this case.[34]

In any event, that result was clearly correct. The government's sole legitimate interest in regulating indecent speech is to provide parents the opportunity to supervise their children's listening and viewing, not to supersede parental authority. "[C]onstitutional interpretation has consistently recognized that the parents' claims to authority in their own household to direct the rearing of their children is basic in the structure of our society." *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (quoted with approval in *Pacifica*, 438 U.S. at 749-50). Judge Leventhal's dissenting opinion in *Pacifica* in the court of appeals concluded that the Commission could "assist parents in their protection of young children," and noted that the channeling of indecent speech "reflects . . . a determination concerning a broad consensus of society, . . . the further view that in our society, with the family as its base block, it is the family that should have the means to make that choice." *Pacifica Foundation v. FCC*, 556 F.2d 9, 33, 37 (D.C. Cir. 1977) (Leventhal, J. dissenting) (cited with approval in *Pacifica*, 438 U.S. at 757 & n.1 (Opinion of Powell, J.)). The courts have repeatedly stressed this interest as the key in determining the permissible scope of regulation.[35]

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[34] The government recently successfully opposed a grant of certiorari in another case that raised the question of whether the court below had correctly applied accepted standards to the facts of a particular case, in the context of the most recent Helms Amendment regulating dial-it services. *See* Dial Br. at 8-9, *supra* note 29.

[35] *See, e.g., Cruz v. Ferre*, 755 F.2d 1415, 1420 (11th Cir. 1985) (parental decisionmaking in cable); *Fabulous Associates, Inc. v. Pennsylvania Public Utility Commission*, 896 F.2d 780, 788 (3d Cir. 1990) (parental decisionmaking in dial-it services). Even *Ginsberg v. New York*, which involved speech that was obscene, not indecent, as to children, emphasized that laws prohibiting distribution to minors, while they "aid discharge" of parents' "primary responsi-

The uncontradicted record below establishes that parents (or other adults) are with their children for much of the broadcast day, and are available to supervise their children's viewing and listening. For example, between the hours of 10 p.m. and 6 a.m., the safe harbor period used by the Commission during the decade following *Pacifica*, 99% of all persons aged 17 and younger are under adult supervision; more than 93% are under parental supervision.[36] Similarly, in the midnight to 6 a.m. period, the safe harbor period adopted by the Commission in its December 29, 1987, decision and held to be inadequate by the court of appeals in *ACT I*, more than 98% of persons aged 17 years and younger are under parental supervision.[37]

It is thus beside the point that "minors are present in the audiences for radio and television broadcasts at all times of the day and night." Gov't Pet. 16. *See also* CLF Pet. 28. The record before the court of appeals unequivocally establishes that, because parents have the opportunity to control their children's viewing and listening during most of the day, including the evening hours, the government's interest in "promoting parental supervision of children's listening" can be served without imposing a blanket ban on protected speech. *ACT I*, Pet. App. 37a-38a. That parents may choose not to supervise their children's viewing and listening is not relevant; the governmental interest is precisely in providing parents this choice.

3. Review on this record also would not be appropriate because the judgment below lacks finality. *See, e.g.*,

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bility for children's well being," do "not bar parents who so desire from purchasing the magazines for their children." 390 U.S. at 639.

[36] *See* National Research, Inc., When Children Are In The Presence Of Parents And Other Adults: A Survey of Parents (1990) J.A. 238-239.

[37] *Id.*

Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967) (per curiam) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916) (fact that decree was not final "alone furnished sufficient ground for the denial" of certiorari). The court of appeals remanded this case to the Commission for a hearing to determine the proper hours of a safe harbor period. That hearing has not been held.

If review of the blanket ban were appropriate at all, it would best be considered in the context of a fully-developed Commission record. In its absence, the Court would be unable to evaluate available alternatives to a complete ban on protected speech and the effectiveness of such alternative measures in serving the valid governmental interest.[38]

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[38] A grant of certiorari would also be undesirable because of the likelihood that Justice Thomas would be unavailable to review this case due to his participation when it was heard in the court of appeals. *Cf.* 28 U.S.C. § 47 (1988) ("No judge shall hear or determine an appeal from the decision of a case or issue tried by him"). His absence would create the possibility of a divided Court, which counsels against a grant of certiorari. As then-Justice Rehnquist recognized, "[w]hile it can seldom be predicted with confidence at the time that a Justice addresses himself to the issue of disqualification whether or not the Court in a particular case will be closely divided, the disqualification of one Justice of this Court raises the possibility of an affirmance of the judgment below by an equally divided Court." *Laird v. Tatum*, 409 U.S. 824, 837-838 (1972) (Rehnquist, J.) (memorandum decision).

CONCLUSION

The petition for a writ of certiorari should be denied.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1991

CHILDREN'S LEGAL FOUNDATION, INC. AND AMERICAN FAMILY ASSOCIATION, INC.,

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
PETITIONERS

v.

ACTION FOR CHILDREN'S TELEVISION, et al.,
RESPONDENTS

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF OF PETITIONERS CHILDREN'S LEGAL FOUNDATION AND AMERICAN FAMILY ASSOCIATION

The following points reply to the respondents' brief in opposition of the Petition for Writ of Certiorari.

I. The Prohibition on the Broadcast of Indecent Speech is Not An Unconstitutional Restriction on Speech

Respondents have attempted to portray the

consequences of the implementation of a 24-hour prohibition of indecent broadcast under 18 U.S.C. §1464, as the elimination of all sexually explicit material on broadcast television and radio. The respondents liken this restriction to the state statute reviewed by this Court in Butler v Michigan, 352 U.S. 380 (1957), and other decisions which have reviewed attempts to prohibit the dissemination of indecent material on cable television.

The error in this analysis is that in Butler, the Court was reviewing a state statute that restricted the dissemination of all material that would be obscene as to minors within the state. It included magazines, recordings, books, visual material and any other form of sexually explicit material. Unlike Butler, this 18 U.S. C. §1464 applies only to broadcast television and radio. All other means of dissemination of sexually explicit material are left unrestricted under this statute. Additionally, this regulation only restricts "language or material that depicts or describes, in terms patently offensive . . . sexual or excretory activities or organs," not all sexually explicit material.

The respondents and the District of Columbia Circuit have ignored this Court's decision in Federal Communications Commission v Pacifica Foundation, 438 U.S. 726 (1978), and instead relied, self-servingly, on a previous decision by the D.C. Circuit that it stated compelled the "rejection . . . of a total ban on the broadcast of indecent material." Action for Children's Television v Federal Communications Commission, 932 F.2d 1504, 1508 (D.C.Cir. 1991). While the use of a prior decision by the D.C. Circuit was expedient, it was a misstatement of the law, a misapplication of the prior case, and misplaced reliance on correct precedent by the court.

The need for review in this case is specifically based upon the D.C. Circuit's willful avoidance of this Court's decision in Pacifica and the subsequent decisions that have reinforced this Court's position on the uniqueness of the broadcast industry. The attempts by the D.C. Circuit, as urged by the respondents, to apply decisions in which the regulation or statute under review applied to media other than broadcast television and radio only further serves to illustrate this uniqueness.

The courts that have addressed the attempted regulation of indecent cable programming have specifically noted the legal and practical differences between the ability to regulate broadcast programming and cable programming. In Wilkinson v Jones 480 U.S. 926 (1987) (mem.) aff'g 800 F.2d 989 (10th Cir. 1986) (per curiam) aff'g sub nom. Community Television of Utah, Inc. v Wilkinson, 611 F.Supp. 1099 (D.Utah 1985). The court identified the practical differences between cable television and broadcast television and the necessarily resultant regulatory scheme.[1]

1/ "The distinction that the FCC and plaintiffs urge is that cable TV is not an intruder but an invitee whose invitation can be carefully circumscribed. See Pacifica at 748-49, 98 S.Ct. at 3039-40. Because a subscriber must initiate the service, there is not uninvited intrusion into the privacy interest that the Court articulated in Pacifica. * * *." 611 F.Supp. at 1113-14.

The Wilkinson court further stated:

> Thus, the distinctions between Pacifica and the present case are manifest. Pacifica does not authorize the regulation attempted by the Utah Legislature. At best Pacifica stands for the proposition that a federal regulatory agency can monitor consumer complaints directed at broadcasters who operate in the public domain. The differences between radio and cable make Pacifica easily distinguishable and contradicts defendants' argument.

Id. at 1115.

II. Contrary to Respondents Assertion Pacifica Recognized and Relied Upon a Legitimate Governmental Interest in Protecting Adults from Unwelcomed Intrusion

Respondents maintain that the only governmental interest upon which the restriction of broadcast indecency may be legitimately based is the need to protect children. While this basis is certainly an interest sufficient to sustain this regulation, it is not the only legitimate governmental interest involved. In fact, this Court in Pacifica, specifically recognized an interest ahead of the interest the government had in protecting children. The Court stated:

> Patently offensive,indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder. * * *. Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content.

438 U.S. at 748.

The interests involved in protecting the privacy of the home is equally, if not more so, applicable to adults rather than children. The Pacifica Court clearly recognized the legitimacy of the government's interest in protecting the privacy of the individual's home. The recognition of the privacy interest is particularly significant in light of the fact that the initial complainant in Pacifica heard the offending broadcasting while riding in an automobile—outside the confines of his home. If this Court recognized the legitimacy

of the privacy interest as it relates to the broadcast of indecent material in the context of adults riding in an automobile, then the underlying rationale is even more significant to the privacy of the home. The FCC's failure to rely upon and state this important governmental interest in its earlier position on the issue is of no importance, and certainly does not change the reasoning set forth in Pacifica.

The position of the respondents and the D.C. Circuit is and has been that parents are responsible for the supervision of their children and that the 24-hour prohibition on the broadcast of indecent material is overbroad. There was ample evidence before the Commission to support the finding that children are in the broadcast audience, in significant numbers, without supervision at all times of the day. The respondents cite a survey by National Research, Inc., that found "between the hours of 10 p.m. and 6 a.m., . . ., 99% of all persons aged 17 and younger are under adult supervision; more than 93% are under parental supervision." Brief for Action for Children's Television, et al., at 18, Children's Legal Foundation, Inc. et al v Action for Children's Television et al No. 91-833 (Jan. 1992). The research upon which the respondents rely and the Commission did not, was commissioned by Action for Children's Television and identified only the times when an adult or a parent "had the opportunity to supervise the child" not actually supervise the child. Comments of Action for Children's Television, In the Matter of Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. §1464, MM Docket No. 89-494 (August 1990).

As the facts of the Pacifica case illustrate, the broadcast of indecent material makes effective parental supervision almost, if not virtually, impossible. The individuals involved in Pacifica were a man and his child.

The father was as attentive to the needs of his child as reasonably possible and yet they were both caught unaware and assaulted by the indecent broadcast. The D.C. Circuit has re-written the concept of parental supervision for its own end. Parental supervision has never meant merely the opportunity for a parent to supervise his child, but the actual ability on the part of the parent to supervise the activities. In the case of broadcast indecency, both the opportunity and the actual ability are absent.

III. The Judgment of the District of Columbia Circuit Court is a Final Judgment

Respondents assert that the judgment by the D.C. Circuit lacks finality. The respondents state that "review . . . would be best considered in the context of a fully-developed Commission record." It is difficult to conceive of a more thorough investigation and analysis on the part of a federal agency than that undertaken and produced by the Federal Communications Commission in this matter. The Commission, during the pendency of this matter in the D.C. Circuit issued its Notice of Inquiry into the matter of broadcast indecency. The Commission received in response to the Notice "over 92,500 formal and informal responses." Report of the Commission In the Matter of Enforcement Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464, at 2, n.6. The Commission received thirty-two separate formal initial and reply comments from individuals and organizations.[2]

2/ Several organizations filed comments jointly. In total, approximately 94 separate organizations or individuals formally participated in the commenting process.

All parties concerned in this matter have been completely and fully heard on this matter. The Commission, after careful consideration, issued its Report as required by the D.C. Circuit. Contrary to the Commission's Report and the underlying evidentiary matter, the D.C. Circuit found the regulations to be unconstitutional. A further hearing to determine the proper hours of a safe harbor period is unnecessary, since such a period is not constitutionally mandated.

IV. Conclusion

The judgment of the District of Columbia Circuit Court should be reversed and should be remanded for adjudication consistent with this Court's decision in Pacifica.

Respectfully submitted,

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